



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

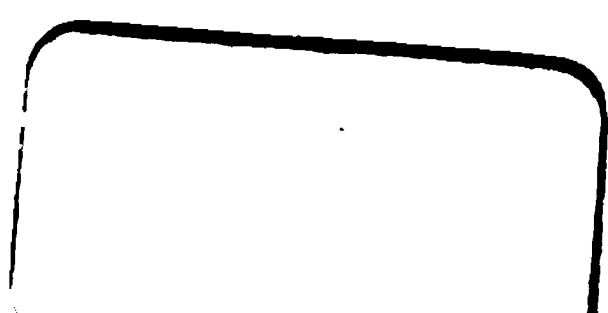
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



JSN

JAC

ETT

U.2

JSN
JAC
ETT

v. 2

REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE

Courts of King's Bench & Common Pleas,

AND ON

The Circuit;

FROM

THE SITTINGS IN EASTER TERM, 1825,

TO THE

SITTINGS IN TRINITY TERM, 1827.

By F. A. CARRINGTON & J. PAYNE, ESQRS.

OF LINCOLN'S INN, BARRISTERS AT LAW.

VOL. II.

LONDON:

S. SWEET, 3, CHANCERY-LANE, AND R. PHENEY, INNER TEMPLE-LANE,

Law Booksellers and Publishers:

AND R. MILLIKEN, GRAFTON STREET, DUBLIN.

1827.

LAW DEPARTMENT
LELAND STANFORD, JR., UNIVERSITY
LIBRARY OF THE

40255204

JUN 27 1901

LONDON:
W. M'DOWALL, PRINTER, PEMBERTON-ROW,
GOUGH-SQUARE.

A

TABLE

OF THE

NAMES OF CASES REPORTED.

[The numerals refer to the Addenda at the end of the Volume.]

A.	Page		Page
ABGOOD, Rex <i>v.</i>	436	Bishop, Ragget <i>v.</i>	343
Adamson, Berry <i>v.</i>	503	——— Sullivan <i>v.</i>	359
Algar, Fisher <i>v.</i>	374	Blake, Percival <i>v.</i>	514
———, Jarmain <i>v.</i>	249	Bleasby <i>v.</i> Crossley	213
Amos, Cooper <i>v.</i>	267	Bligh <i>v.</i> Wellesley	400
Anderson, Petty <i>v.</i>	38	Bloxam <i>v.</i> Elsee	vi
——— <i>v.</i> Shaw	85	Bond <i>v.</i> Rust	342
Andrewes, Doe <i>d.</i> Palmer <i>v.</i>	593	Booth <i>v.</i> Hanley	288
Apothecaries' Company <i>v.</i>		Bourke <i>v.</i> Warren	307
Fernyhough	438	Bowles, Daniel <i>v.</i>	553
Appleton <i>v.</i> Campbell	347	Bowring <i>v.</i> Stevens	387
Arnott <i>v.</i> Redfern	88	Bradford <i>v.</i> Levy	137
Ashby and others, Lloyd <i>v.</i>	138, iii	Brain <i>v.</i> Harden	52
Atcheson, Walls <i>v.</i>	268	Brathwaite <i>v.</i> Churchill	341
Atwood <i>v.</i> Griffin	368	Breeds, Hughes <i>v.</i>	159
Austin, Crowder <i>v.</i>	208	Brewster, Spooner <i>v.</i>	34
		Briggs, Taylor <i>v.</i>	525
B.		Brookes <i>v.</i> Davies	186
Back <i>v.</i> Stacey	465	———, Fussil <i>v.</i>	318
Bagwell, Tooth <i>v.</i>	187, 271	Brown, Dean <i>v.</i>	62, i.
Baker, Johnson <i>v.</i>	207	——— Ruthven <i>v.</i>	535
Banks, Cooke (<i>Esq.</i>) <i>v.</i>	478	Browning, Widger <i>v.</i>	523
——— <i>v.</i> Kain	597	Bryan <i>v.</i> Wagstaffe	125, ii.
Barker, Curtis <i>v.</i>	185	Buckingham <i>v.</i> Murray	46
Barnes <i>v.</i> Winkler	345	Bullock <i>v.</i> Lloyd	119
Barough <i>v.</i> White	8	Bulnois, Huttman <i>v.</i>	510
Basing, Butler <i>v.</i>	613	Bunning, Chadwick <i>v.</i>	106
Batte, Wooley <i>v.</i>	417	Burton <i>v.</i> Payne	520
Baxter <i>v.</i> Portsmouth, (<i>Earl</i>)	178	Burwood <i>v.</i> Kant	123
Bearblock <i>v.</i> Hancock	425	Bury, Edis <i>v.</i>	559
Beckwith <i>v.</i> Corral	261	Buszard <i>v.</i> Capel	541
Beeston <i>v.</i> Collyer	607	Butler <i>v.</i> Basing	613
Berry <i>v.</i> Adamson	503	——— <i>v.</i> Turley	585
Best <i>v.</i> Osborne	74	Butterworth, King <i>v.</i>	391
Billard <i>v.</i> Hayden	472		
Billingham, Rex <i>v.</i>	234	C.	
Bird, Fayle <i>v.</i>	303, ix	Campbell, Appleton <i>v.</i>	347
Biré <i>v.</i> Moreau	376	Capel, Buszard <i>v.</i>	541

TABLE OF THE CASES REPORTED.

Carpenter, Townsend v.	-	118
Chadwick v. Bunning	-	106
Chapman, East v.	-	570
Cheminant v. Thornton	-	50
Child v. Grace	-	193
Chinn v. Morris	-	361
Churchill, Brathwaite v.	-	341
Clarke v. King	-	286
Clement, Yrisarri v.	-	223
Clifford, Drew and others v.	-	69
Clutton, Cobbett v.	-	471
Cobbett v. Clutton	-	471
Codd, Keasley v.	-	408
Cohen, Wilson v.	-	363
Collins, Watt v.	-	71
Collyer, Beeston v.	-	607
Cook, Smith v.	-	276
Cooke v. Percival (<i>Clerk</i>), ——— (<i>Esq.</i>) v. Banks	-	460 478
Cooper v. Amos	-	267
Corder, Enderby v.	-	203
Corral, Beckwith v.	-	261
Correia, Fenton v.	-	45
Court, Wright v.	-	232
Cowles v. Dunbar	-	565
Creswell, Dafter v.	-	161
Cross, Rex v.	-	483
Crossley, Bleasby v. ———— Guthrie v.	-	213 301
Crowder v. Austin	-	208
————, (<i>Esq.</i>), Towne v.	-	355
Curtis v. Barker	-	185
————, Evans v.	-	296
D.		
Dafter v. Creswell	-	161
Daniel v. Bowles	-	553
Darnell v. Tratt	-	82
Davies, Brookes v.	-	186
Davis, Gardiner v.	-	49
———— Hall v.	-	33
———— Harding v.	-	77
Deakins, Weller v.	-	618
Dean v. Brown	-	62, i.
———— v. M'Ghie	-	387
Deere, Reed v.	-	624
Denn d. Bulkeley v. Wilford	-	173, iii.
Depree, Truwitt v.	-	557
Derrington, Rex v.	-	418
Deveridge, Dixon v.	-	109
Dibdin v. Morris	-	44
Dickinson v. Goom	-	194
Dixon v. Deveridge	-	109
Dod v. Edwards	-	602
Dodwell v. Gibbs, (<i>Gent.</i>)	-	615
Doe d. Barraud v. Lawrence	-	134
———— Chandless v. Robson	-	245
———— Clark v. Spencer	-	79
———— Knight v. Rowe	-	246
———— Lloyd v. Passingham	-	440
———— Nutt v. Nutt	-	430
———— Palmer v. Andrewes	-	593
———— Scott v. Miller	-	348
———— Tindale v. Hemming	-	462
———— Ubele v. Kilner	-	289
Dolman v. Orchard & ors.	-	104
Downe v. Halling and others	-	11
Drew v. Clifford	-	69
———— v. Durnborough	-	198
————, Peacock v.	-	51, n.
Dunbar, Cowles v.	-	565
Durnborough, Drew v.	-	198
E.		
East v. Chapman	-	570
Edis v. Bury	-	559
Edwards, Dod v.	-	602
Elsee, Bloxam v.	-	vi
Enderby v. Corder	-	203
England, Kerby v.	-	300
Evans v. Curtis	-	296
Everest, Randall v.	-	577
F.		
Fairman v. Grimble	-	266
Farquhar v. Southey	-	497
Farr, Gough v.	-	631
Fawcett v. Wrathall	-	305
Fayle v. Bird	-	303, ix
Fenton v. Correia	-	45
Fernyhough, Apothecaries' Company v.	-	438
Fisher v. Algar	-	374
Flemington v. Smithers	-	292
Fletcher v. Froggatt	-	569
Ford, Wilkins v.	-	344
Foreman, Sterry v.	-	592
Forster, Taylor v.	-	195
Foss, Goldstein v.	-	252, iii

TABLE OF THE CASES REPORTED.

v

Foster v. Frampton -	469
Frampton, Foster v. -	469
Freshfield, Loyd v. -	325
Friend v. Harrison -	584
Froggatt, Fletcher v. -	569
Fry, Parkin v. -	311
Fussil v. Brookes -	318

G.

Gallatly, Wilson v. -	467
Gandolfi, Pagani v. -	370
Gardiner v. Davis -	49
Gas Light and Coke Com- pany v. Nicholls -	365
Gibbs, Dodwell v. -	615
Giles assig. of Hills v. Powell	259
Gilman and ors., Hughes v.	32
Gimson v. Woodfull -	41
Gisburne, Thorpe v. -	21
Gladwin, Whittington v. -	146
Godbolt, Munn v. -	97
Goldstein v. Foss -	252, iii
Goldstone v. Osborn, (Bart.)	550
Goodhind, Hilton v. -	591
Goodrick, Hewet & anr. v.	468
Goodson v. Gouldsmith	555
Goodwin, Williams v. -	257
Goom & anr., Dickinson v.	194
Gough v. Farr -	631
Gouldsmith, Goodson v.	555
Grace, Child v. -	193
Graddon v. Price -	610
Gray, Small v. -	605
Greaves v. Hunter -	477
Green, Townson v. -	110
Greenwood, Skyring v. -	ii
———, Wemys v. -	483
Gresham v. Postan -	540
Gresley v. Price -	48
Griffin, Atwood v. -	368
Grimble, Fairman v. -	266
Grindall, Rex v. -	563
Groves, Hickenbotham v.	492
Guthrie v. Crossley -	301

H.

Hadden, Rex v. -	184
Hadwen v. Mendisabal -	20
Hall v. Davis -	33
Halling and others, Downe v.	11

Hancock, Bearblock v. -	425
Hanley, Booth v. -	288
Hannaford v. Hunn -	148
Harden, Brain v. -	52
Harding v. Davis -	77
Harrison, Friend v. -	584
Hart, Strong v. -	55
Hartland, Moneypenny v.	378
Hassall and anr., Rex v. -	434
Hayden, Billard v. -	472
Haynes v. Hayton (Esq.)	621
Hayton, (Esq.), Haynes v.	621
Hazy & Collins, Rex v. -	458
Healey v. Jacobs -	616
Hemming, Doe d. Tindale v.	462
Hewet & anr. v. Goodrick	468
Hewitt v. Thompson -	372
Hewlett v. Laycock -	574
Hickenbotham v. Groves	492
Hilton v. Goodhind -	591
Hodgetts, Powell v. -	482
Hogarth v. Jackson -	595
Holiday v. Sigil -	176
——— v. Mann and anr.	509
Hone, Perring (Bart.) v.	401
Horton, Wells v. -	383
Houliston v. Smyth -	22
Howell v. Young -	238
Hubert v. Moreau -	528
Hughes v. Breeds -	159
——— v. Gilman and ors.	32
———, Rex v. -	420
Hunn, Hannaford v. -	148
Hunter, Greaves v. -	477
——— Rogers v. -	601
——— v. Westbrook -	578
Huttman v. Bulnois -	510

J.

Jacobs, Healey v. -	616
Jackson, Hogarth v. -	595
James v. Swift -	237
Jarmain v. Algar -	249
Jefferies, Montriou v. -	113
Jennings, Wooley v. -	144
Johnson v. Baker -	207
Jones v. Stroud and wife	196
———, Proctor v. -	532
———, Rex v. -	629
Juda, Ware v. -	351

TABLE OF THE CASES REPORTED.

Just, Newborne <i>v.</i> - -	76	Miller, Doe <i>d.</i> Scott <i>v.</i> -	348
K.		Milner <i>v.</i> Maclean - -	17
Kain, Banks <i>v.</i> - -	597	Moneypenny <i>v.</i> Hartland	378
Kant, Burwood <i>v.</i> - -	123	Monk, Pope <i>v.</i> - -	112
Keasley <i>v.</i> Codd (<i>Esq.</i>) -	408	Montriau <i>v.</i> Jefferies -	113
Kemp, Loader <i>v.</i> - -	375	Moore, Merle <i>v.</i> - -	275
Kempson <i>v.</i> Saunders -	366	——— Rex <i>v.</i> - -	235
Kerby <i>v.</i> England - -	300	Moreau, Biré <i>v.</i> - -	376
Kilner, Doe <i>d.</i> Ubele <i>v.</i> -	289	———, Hubert <i>v.</i> - -	528
King, Clarke <i>v.</i> - -	286	Morris, Chinn <i>v.</i> - -	361
—— <i>v.</i> Butterworth -	391	———, Dibdin <i>v.</i> - -	44
——, Rex <i>v.</i> - -	412	Mott, Rex <i>v.</i> - -	521
L.		Munn <i>v.</i> Godbolt - -	97
Larby, Symes <i>v.</i> - -	358	Murray, Buckingham <i>v.</i> -	46
Lawrence, Doe <i>d.</i> Barraud <i>v.</i>	134	Musgrave, Raggett <i>v.</i> -	556
Laycock, Hewlett <i>v.</i> -	574	——— Saunders <i>v.</i> 294, ix	
Leatham, Snow <i>v.</i> - -	314	Myers <i>v.</i> Taylor - -	306
Le Blanc, Maudslay <i>v.</i> -	409	N.	
Leslie, Mainwaring <i>v.</i> -	507	Nassau, Tinsley <i>v.</i> - -	582
Levy, Bradford <i>v.</i> - -	137	Neil, Rex <i>v.</i> - -	485
Lewis, Prince <i>v.</i> - -	66, ii	Newborn <i>v.</i> Just - -	76
——— Rex <i>v.</i> - -	628	Newton, Thomas <i>v.</i> - -	606
Limbert, Lindsay <i>v.</i> - -	526	Nias <i>v.</i> Nicholson - -	120
Lindsay <i>v.</i> Limbert - -	526	Nicholls, Gas Light and	
Linthorne, Rayner <i>v.</i> -	124	Coke Company <i>v.</i> - -	365
Lloyd <i>v.</i> Bullock - -	119	Nicholson, Nias <i>v.</i> - -	120
—— <i>v.</i> Ashby and ors. 138, iii		Nutt, Doe <i>d.</i> Nutt (<i>Widow</i>) <i>v.</i>	430
Loader <i>v.</i> Kemp - -	375	O.	
Loyd <i>v.</i> Freshfield - -	325	Ogilvie, Rex <i>v.</i> - -	230
M.		Onwhyn, Stockdale <i>v.</i> -	163
M'Dougall <i>v.</i> Young - -	278	Orchard, Dolman <i>v.</i> - -	104
M'Ghie, Dunn <i>v.</i> - -	387	Osborn, Goldstone (<i>Bart.</i>) <i>v.</i>	550
M'Gillivray <i>v.</i> Simson -	320	Osborne, Best <i>v.</i> - -	74
Maclean, Milner <i>v.</i> - -	17	P.	
Mainwaring <i>v.</i> Leslie -	507	Packington, (<i>Bart.</i>), Wink-	
Mann & anr., Holliday <i>v.</i>	509	field <i>v.</i> - -	599
Manvell <i>v.</i> Thomson - -	303	Pagani <i>v.</i> Gandolfi - -	370
Martin, Waldo <i>v.</i> - -	1	Paine <i>v.</i> Pritchard - -	558
Martineau <i>v.</i> Woodland -	65	Palmerston, (<i>Lord</i>), Mayel-	
Matthias <i>v.</i> Mesnard - -	353	ston <i>v.</i> - -	474
Maud <i>v.</i> Waterhouse - -	579	Parkin <i>v.</i> Fry - -	311
Maudslay <i>v.</i> Le Blanc - -	409	Parsons, Tilk <i>v.</i> - -	201
Mavor <i>v.</i> Pyne - -	91	Passingham, Doe <i>d.</i> Lloyd <i>v.</i>	440
Mayelston <i>v.</i> Palmerston (<i>Ld.</i>)	474	Payne, Burton <i>v.</i> - -	520
Mendisabal, Hadwen <i>v.</i> -	20	Peacock <i>v.</i> Dray - -	51, n.
Merle <i>v.</i> Moore - -	275	———, Snow <i>v.</i> - -	215
Mesnard, Matthias <i>v.</i> -	353	Percival (<i>Clerk</i>) <i>v.</i> Cooke -	460

TABLE OF THE CASES REPORTED.

vii

Percival <i>v.</i> Blake	-	-	514
Perring (<i>Bart.</i>) <i>v.</i> Hone	-	-	401
Petty <i>v.</i> Anderson	-	-	38
Pitman, Rex <i>v.</i>	-	-	423
Pope <i>v.</i> Monk	-	-	112
Poplett <i>v.</i> Stockdale	-	-	198
Portsmouth, (<i>Earl</i>) Baxter <i>v.</i>	-	-	178
Postan, Gresham <i>v.</i>	-	-	540
Powell <i>v.</i> Giles	-	-	259
—— <i>v.</i> Hodgetts	-	-	432
Pratt <i>v.</i> Willey	-	-	350
Price, Graddon <i>v.</i>	-	-	610
—— Gresley <i>v.</i>	-	-	48
Prince <i>v.</i> Lewis	-	-	66, ii
——, Rex <i>v.</i>	-	-	517
Pritchard, Paine <i>v.</i>	-	-	558
Proctor <i>v.</i> Jones	-	-	532
Promotions,	-	-	293, 641
Prosser <i>v.</i> Rowe	-	-	421
Pyne, Mavor <i>v.</i>	-	-	91

R.

Raggett <i>v.</i> Bishop	-	-	343
—— <i>v.</i> Musgrave	-	-	556
Raikes <i>v.</i> Richards	-	-	562
Ramsden, Rex <i>v.</i>	-	-	603
Randall <i>v.</i> Everest	-	-	577
Rayner <i>v.</i> Linthorne	-	-	124
Redfern, Arnott <i>v.</i>	-	-	88
Reed <i>v.</i> Deere	-	-	624
Rex <i>v.</i> Abgood	-	-	436
—— <i>v.</i> Billingham	-	-	234
—— <i>v.</i> Cross	-	-	483
—— <i>v.</i> Derrington	-	-	418
—— <i>v.</i> Grindall	-	-	563
—— <i>v.</i> Hadden	-	-	184
—— <i>v.</i> Hassall	-	-	434
—— <i>v.</i> Hazy and Collins	-	-	458
—— <i>v.</i> Hughes	-	-	420
—— <i>v.</i> Jones	-	-	629
—— <i>v.</i> King	-	-	412
—— <i>v.</i> Lewis	-	-	628
—— <i>v.</i> Moore	-	-	235
—— <i>v.</i> Mott	-	-	521
—— <i>v.</i> Ogilvie	-	-	230
—— <i>v.</i> Neil	-	-	485
—— <i>v.</i> Pitman	-	-	423
—— <i>v.</i> Prince	-	-	517
—— <i>v.</i> Ramsden	-	-	603
—— <i>v.</i> Rosenstein	-	-	414

Rex <i>v.</i> Sheen	-	-	634
—— <i>v.</i> Skerritt	-	-	427
—— <i>v.</i> William Smith	-	-	449
—— <i>v.</i> Thomas Smith	-	-	633
—— <i>v.</i> Stimpson	-	-	415
—— <i>v.</i> Streek	-	-	413
—— <i>v.</i> ——	-	-	459
—— <i>v.</i> Tucker	-	-	500
—— <i>v.</i> Watts	-	-	486
—— <i>v.</i> Wiblin	-	-	10
Richards, Raikes <i>v.</i>	-	-	562
Ripley <i>v.</i> Scarfe	-	-	132
Robinson <i>v.</i> Ward	-	-	59
Robson, Doe <i>d.</i> Chandless <i>v.</i>	-	-	245
Rogers <i>v.</i> Hunter	-	-	601
Rosenstein, Rex <i>v.</i>	-	-	414
Rowe, Doe <i>d.</i> Knight <i>v.</i>	-	-	246
——, Prosser <i>v.</i>	-	-	421
Rust, Bond <i>v.</i>	-	-	342
Ruston, Tucker <i>v.</i>	-	-	86
Ruthven <i>v.</i> Brown	-	-	535

S.

Salmon <i>v.</i> Ward	-	-	211
Saunders, Kempson <i>v.</i>	-	-	366
—— <i>v.</i> Musgrave	-	-	294, ix
Scaife, Ripley <i>v.</i>	-	-	132
Sellick <i>v.</i> Smith	-	-	284
Shaw, Anderson <i>v.</i>	-	-	85
Sheen, Rex <i>v.</i>	-	-	634
Sigil, Holiday <i>v.</i>	-	-	176
Sills <i>v.</i> Southwark Bridge Co.	-	-	371
Simson, M'Gillivray <i>v.</i>	-	-	320
Skerrit, Rex <i>v.</i>	-	-	427
Skyring <i>v.</i> Greenwood	-	-	ii
Slark, Upston <i>v.</i>	-	-	598
Sly <i>v.</i> Stevenson	-	-	464
Small <i>v.</i> Gray	-	-	605
Smith <i>v.</i> Cook and anr.	-	-	276
—— William, Rex <i>v.</i>	-	-	449
—— Thomas, Rex <i>v.</i>	-	-	633
—— Sellick <i>v.</i>	-	-	284
—— <i>v.</i> Sparrow	-	-	544
Smithers, Flemington <i>v.</i>	-	-	292
Smyth, Houlston <i>v.</i>	-	-	22
Snow <i>v.</i> Leatham	-	-	314
Snow <i>v.</i> Peacock	-	-	215
Southey, Farquhar <i>v.</i>	-	-	497
Southwark Bridge Compa- ny <i>v.</i> Sills	-	-	371

Sparrow, Smith <i>v.</i>	-	544
Spencer, Doe <i>d.</i> Clark <i>v.</i>	-	79
Spooner <i>v.</i> Brewster	-	34
Stacey, Back <i>v.</i>	-	465
Sterry <i>v.</i> Foreman	-	592
Stevens, Bowring <i>v.</i>	-	337
Stevenson, Sly <i>v.</i>	-	464
Stimpson, Rex <i>v.</i>	-	415
Stockdale, Poplett <i>v.</i>	-	198
——— <i>v.</i> Onwhyn	-	163
Streck, Rex <i>v.</i>	-	413
Strong <i>v.</i> Hart	-	55
Stroud and Wife, Jones <i>v.</i>	-	196
Stuart <i>v.</i> Whittaker	-	100
Sullivan <i>v.</i> Bishop	-	359
Swift, Esq., James <i>v.</i>	-	237
Symes <i>v.</i> Larby	-	358

T.

Taylor, Myers <i>v.</i>	-	306
——— <i>v.</i> Forster	-	195
——— <i>v.</i> Briggs	-	525
Tharpe <i>v.</i> Gisburne	-	21
Thomas <i>v.</i> Newton	-	606
Thomson, Manvell <i>v.</i>	-	303
Thompson, Hewitt <i>v.</i>	-	372
——— <i>v.</i> Trail	-	334
Thornton, Cheminant <i>v.</i>	-	50
Tilk <i>v.</i> Parsons	-	201
Tinsley <i>v.</i> Nassau (<i>Esq.</i>)	-	582
Tod <i>v.</i> Winchelsea, (<i>Earl</i>)	-	488
Tooth <i>v.</i> Bagwell	- 187,	271
Towne <i>v.</i> Crowder, (<i>Esq.</i>)	-	355
Townsend <i>v.</i> Carpenter	-	118
Townson <i>v.</i> Green	-	110
Trail, Thompson <i>v.</i>	-	334
Tratt, Darnell <i>v.</i>	-	82
Truwhitt <i>v.</i> Depree	-	557
Tucker <i>v.</i> Ruston	-	86
Tucker, Rex <i>v.</i>	-	500
Turley, Butler <i>v.</i>	-	585

U.

Upston <i>v.</i> Slark	-	598
------------------------	---	-----

V.

Venn, Webber <i>v.</i>	-	310
------------------------	---	-----

W.

Wace, Watson <i>v.</i>	-	171
Wagstaffe, Bryan <i>v.</i>	-	125, ii
Waldo <i>v.</i> Martin	-	1
Walls <i>v.</i> Atcheson	-	268
Ward, Robinson <i>v.</i>	-	59
——— Salmon <i>v.</i>	-	211
Ware <i>v.</i> Juda	-	351
Warren, Bourke <i>v.</i>	-	307
Waterhouse, Maud <i>v.</i>	-	579
Watson <i>v.</i> Wace	-	171
Watt <i>v.</i> Collins	-	71
Watts, Rex <i>v.</i>	-	486
Webber <i>v.</i> Venn	-	310
Weller <i>v.</i> Deakins	-	618
Wellesley, Bligh <i>v.</i>	-	400
Wells <i>v.</i> Horton	-	383
Wells, Wilkins <i>v.</i>	-	231
Wemys, (<i>Esq.</i>) <i>v.</i> Greenwood	-	483
Westbrook, Hunter <i>v.</i>	-	578
White, Barough <i>v.</i>	-	8
Whittaker, Stuart <i>v.</i>	-	100
Whittington <i>v.</i> Gladwin	-	146
Wiblin, Rex <i>v.</i>	-	10
Widger <i>v.</i> Browning	-	523
Wilford, Den <i>d.</i> Bulkeley <i>v.</i>	-	173, iii
Wilkins <i>v.</i> Ford	-	344
——— <i>v.</i> Wells	-	231
Willey, Pratt <i>v.</i>	-	350
Williams <i>v.</i> Goodwin	-	257
Wilson <i>v.</i> Cohen	-	863
Wilson <i>v.</i> Gallatly	-	467
Winchelsea, (<i>Earl</i>) <i>v.</i> Ford	-	488
Winkfield <i>v.</i> Packington (<i>Bt.</i>)	-	599
Winkler, Barnes <i>v.</i>	-	345
Woodfull, Gimson <i>v.</i>	-	41
Woodland, Martineau <i>v.</i>	-	65
Wooley <i>v.</i> Batte	-	417
——— <i>v.</i> Jennings	-	144
Wrathall, Fawcett <i>v.</i>	-	305
Wright <i>v.</i> Court	-	232

Y.

Young, Howell <i>v.</i>	-	238
——— Macdougall <i>v.</i>	-	278
Yrisarri <i>v.</i> Clement	-	223

ADDENDA.

~~ADDENDA.~~

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY AND HOLROYD, JS*.

In Bank.

DEAN *v.* BROWN, Esq. and Others.

(See, *ante*, p. 62.)

1826.

THE motion for a new trial in this case now came on to be argued. *April, 22nd.*

Scarlett and *Comyn* shewed cause, and contended, that whether the horse and chaise were, at the time of the making of the settlement, "articles belonging to Miss Tyler, in and about her business," was a question of fact; and that, as such, it had been properly left to the Jury.

Gurney and *Holt*, *contra*.—The stock of feathers could not be put into the schedule, but the horse and chaise might be as easily inserted in it as articles of furniture; a horse and chaise were not necessary to the trade of a plu-massiere; and what is to pass under the words of a deed, is a question not of fact but of law; and even if it were a question for the Jury, it was clear, that if the horse and chaise had been intended to pass, they would have been specified.

ABBOTT, C. J.—The horse and chaise are articles that may belong to any trade; and the Jury have found as a fact, that they did belong to Miss Tyler in and about her business.

* Mr. Justice Littledale was sitting in the Bail Court.

1826.
 DEAN
 v.
 BROWN.

BAYLEY, J.—After the decided cases, it is impossible to question the validity of these deeds. The schedule only includes furniture, but the deed contemplates the stock, and things “in and about” the business. The question is, can a horse and chaise be used in such a business? That is a fact. In this case, they were used principally by the wife. If it had been proved that the wife had only occasionally used them for her trade, it might be different; but, on the evidence, the Jury have found that they were used by her in and about her business.

HOLROYD, J.—I am of opinion that it was a question of fact.

Rule discharged.

BRYAN v. WAGSTAFFE.

(See, *ante*, p. 195.)

THE Court, after hearing an argument, and taking time to consider of their judgment, made the rule absolute for reversing the judgment of outlawry.

April 26th.

PRINCE and Another v. LEWIS.

(See, *ante*, p. 66.)

THE rule for a new trial in this case now came on to be argued; and the Court concurring in the opinion given by the Lord Chief Justice at the trial, discharged the rule.

SKYRING v. GREENWOOD.

(See, *ante*, Vol. I. p. 517.)

THE rule for a new trial in this case having been argued, the Court discharged it(a).

(a) See 6 Dow. & Ry. 401. S. C.

1826.

LLOYD *v.* ASHBY.

(See, *ante*, p. 138.)

THE points raised in this case have been turned into a special case, which has not yet been set down for argument.

DENN on the demise of BULKELEY *v.* WILFORD.

(See, *ante*, p. 173.)

THE rule for a new trial in this case was never argued.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, & LITTLEDALE, JS.*

In Bank.

GOLDSTEIN *v.* Foss and Another.

(See, *ante*, p. 252.)

1827.

THE rule for arresting the judgment in this case came on to be argued.

Jan. 27th.

Scarlett, for the plaintiff, submitted, that if there were one good count in the declaration, that would be sufficient

BAYLEY, J.—No. As the judgment is entire, if any one count is defective, the judgment must be arrested.

Scarlett then shewed cause. The first count states that this was a society for the purpose of protecting persons in trade from swindlers and sharpers. That the plaintiff was concerned in trade, and that the defendant published that the plaintiff was unfit to be a member of that society; and on this, even if the words do not of themselves convey clearly the imputation that the plaintiff

* Holroyd, J. was absent from indisposition.

1827.
 GOLDSTEIN
 v.
 FOSS.

was a swindler and sharper, they are capable of being so explained by evidence; and the verdict for the plaintiff is conclusive that such evidence was adduced.

Brougham, on the same side.—The inducement is sufficient, and the words “that the plaintiff is not considered fit to be ballotted for as a member,” mean, that after an inquiry and an examination into his character, that is the result. The ordinary acceptation of the words clearly imports some blame, and if only a *scintilla* of blame attached, the count would be good after verdict.

Chitty, on the same side.—A *colloquium* is unnecessary, when the words of necessity imply that the conversation related to the plaintiff’s situation; *Carn v. Osgood* (a); and a count for saying that a man is a bankrupt, is good without a *colloquium* of his trade.

BAYLEY, J.—Because, unless he were a trader, he could not become bankrupt.

Chitty.—In the case of *Coles v. Haveland* (b), the words stated in the declaration were, that the plaintiff had strained a mare; and those words were, without a *colloquium* or introductory averment, held actionable, as words imputing unnatural practices; the Jury having found the *innuendo* which put that interpretation upon them.

Bolland, contra.—If the words of themselves are not actionable, the *innuendo* cannot enlarge the meaning, without introductory matter, by way of inducement, or a *colloquium*. It is said, that the plaintiff is considered an improper person to be a member of this society. The same might be said of me, and the reason of that might be, that they never admitted lawyers to be members of this society.

(a) 1 Lev. 280.

(b) Cro. Eliz. 250.

ADDENDA.

Campbell, on the same side.—These words are not actionable. But if they were, and the plaintiff has put an *innuendo*, which, for want of introductory matter, is not supportable, the count is bad. The *innuendo* says, that the defendants, by these words, mean that the plaintiff was a swindler and sharper, and evidence was given of that; and it being left to the Jury, they gave damages on that interpretation of the words. Now the plaintiff cannot, after this, say that the words meant less, nor put a more mitigated construction upon them. To extend the meaning of words, prefatory matter is necessary. Then, are the words actionable in themselves, rejecting the *innuendo*? Must all men, except swindlers and sharpers, be of necessity fit and proper persons to be members of this society? I say, certainly not.

1827.
GOLDSTERN
v.
FOSS.

ABBOTT, C. J.—The first question is, whether the matter alleged to be libellous is connected with the introductory matter; if so, I should think the action maintainable. But here, I think, they are not connected, and that the introductory matter stands quite alone. The count states, that the defendant published the alleged libel of and concerning the plaintiff in his trade; and the libel states the plaintiff to be unfit to belong to a certain society, and the pleader puts in an *innuendo*, that that means that he was a swindler and sharper. However, that by no means follows. Defects, far short of that, may conduce to that conclusion; and all this being entirely disconnected from the prefatory matter, we cannot say that any reflection at all is cast on the plaintiff. Private regulations may exist to exclude certain classes, or to make certain qualifications necessary, which the plaintiff may not possess.

BAYLEY, J.—I think with my Lord C. J., but a Court of error may decide otherwise. Had it been averred, that the society had been in the habit of publishing the names of swindlers and sharpers, and had that averment been connected with the publication of the plaintiff's name in the

1827.
 GOLDSTEIN
 v.
 FOSS.

same manner, it might have supported the action; but here, the society, from which he is reputed to be excluded, is not averred to be the same society mentioned in the inducement. The use of the *innuendo* is to explain and connect the meaning with the prefatory matter, and so is most essential. Lord *Mansfield* says (a), that the words, "you are guilty of the death of Daniel Dolley, and rather than you should go without a hangman, I will hang you," plainly shew, what species of death was meant, and manifestly import a charge of murder; and in that case there was no inducement: but his Lordship adds, to say that a man is the cause of another's death, is widely different, for a physician may be the cause of a man's death, and very innocently so: but the saying that the party is *guilty*, and that he will hang him if necessary, clearly shews, in what sense the words were used. In the present case, there may be many innocent causes incapacitating the plaintiff from being a member of a particular society.

LITLEDALÉ, J., concurred.

Rule absolute for arresting the judgment.

(a) *Peake v. Oldham*, Cowp. 277.

Being unavoidably absent when this case was argued, we are indebted for this note to the kindness of a friend at the bar.

Feb. 1st. BLOXAM and Another, Assignees of FOUDRINIER and Another, Bankrupts, v. ELSEE.
 (See, *ante*, Vol. I. p. 558.)

THE counsel not being able to agree on a special case, the points raised by the defendant's counsel came on to be argued, on shewing cause against the rule for a new trial.

Tindal, S. G., *Marryat*, *Gurney*, and *Curwood*, shewed cause (a). It has been objected, that this patent is granted

(a) All the points made on the motion for a new trial, were argued, but as the Court decided on only one of them, and gave no opinion as to the others, we have confined our report to that point only.

for *a* machine, that will make paper of all widths, from one to twelve feet, but that no one machine, made according to the terms of the specification, will make paper of more than one width. The patent is for the making of paper in sheets of from one to forty-five feet in length, and from one to twelve feet in width; and, looking at the patent and the specification, it is clear, that the patent is granted for the new mode of making the paper, and not for the machine; the patent being not for a single machine, but for a mode of making paper. It is true, that the patent is for a machine for the making of paper, in single sheets, from one to twelve feet wide, and from one to forty-five feet and upwards in length. But, although one machine will make paper of one width only, yet you may have it of any width you please, by having your machine made of the size you want. Again, if the machine were made for twelve feet wide, it was proved by the mechanists at the trial, that, by slight alterations, which any man of skill would introduce, it might be narrowed to the smaller widths: indeed, the specification points this out; for it describes a cylinder as having grooves at the ends, which evidently regulate the width: therefore, it plainly appears, that, by these grooves being put nearer together or further asunder, you regulate the width of the paper.

Scarlett, contra.—By the first patent it appears, that the inventor has represented to the Crown, “that he is in possession of *a machine* for making paper in single sheets without seam or joinings, from one to twelve feet and upwards wide, and from one to forty-five feet and upwards in length, *the method of making which machine* was communicated to him by a certain foreigner, with whom he is connected, and that he conceives the same will be of great public utility,” &c. The *Solicitor-General* says, the patent would be satisfied if *one* machine would make paper of only one length, and one width; so that when his client takes out a patent for a machine to make paper of all widths,

1827.

BLOXAM

v.
ELSER.

1827.
 BLOXAM
 v.
 FALKE.

he then contends that that is satisfied by shewing that you must have a separate machine for every width. If a man said, "I have invented a mortar, which will fire off bomb-shells of from one to eighty pounds;" would he be speaking the language of either honesty or truth, if it turned out, that you must have eighty mortars to answer the purpose? In the way in which it is stated in the patent, it appears that the width may be varied as much as the length, and that by the same machine. It is said, that the same machine may be altered by various means, so as to make paper of different widths; but, with those alterations, that would not be the machine mentioned in the patent and specifications.

Feb. 3d.

Brougham and Alderson were stopped by the Court.

ABBOTT, C. J.—We are of opinion, that one of the objections raised on the part of the defendant is good. If there is a misrepresentation made to the Crown, the patent is void; and what the representation to the Crown was, must be collected from the recital. Now, it is here recited in the letters patent, that the invention is for producing a certain effect with *one* machine, and that that *one* machine will make paper of all widths from one to twelve feet. The evidence shews, that no one machine will produce this effect, at least, I think such is the evidence; and at all events, we think, there must be a new trial, to have this point laid before the Jury. If this fact is so, the objection is fatal to the original grant; and we are of opinion, that it cannot be cured either by the act of parliament, or the specifications.

Rule absolute for a new trial.

1827.

SAUNDERS *v.* MUSGRAVE, Bart.(See *ante*, p. 294.)

IN this case the Court were of opinion that the sum mentioned was to be considered as rent; and therefore that it was properly deducted by the defendant out of the proceeds of the execution. The marginal note of this case must therefore be altered in the eighth line from the end, by substituting the words "has a right," for the words "ought not."

FAYLE *v.* BIRD.(See *ante*, p. 303.)

IN the course of last Easter Term, the rule in this case came on to be argued.

F. Pollock shewed cause.

Hutchinson was heard in support of it.

The Court yielded to the authority of the case in the Common Pleas, upon which the rule ~~was~~ was obtained, and therefore made it absolute.

The only alteration which it will be necessary to make in the marginal note of this case, will be to strike out the words "*Semble* that," and insert the word "not," before the word "necessary."

CORRIGENDA.

In the case of *Atwood v. Griffin*, ante, p. 368, line 5, from the bottom, *for the word* "bearer" *read* "—— or order;" and in the same page, lines 3 and 4, from the bottom, *for the words* "addition of the words 'or order,'" *read* "insertion of the name of Groves in the blank." The marginal note of this case must be made to correspond with these alterations.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

Sittings at Westminster, in Easter Term, 1825.

BEFORE MR. JUSTICE BAYLEY,

(Who sat for the Lord Chief Justice.)

WALDO v. MARTIN.

1825.

May 5th.

COVENANT. This action was brought on a deed, by which the defendant covenanted to account to the plaintiff for a moiety of the profits of the office of bag-bearer of the Pipe-office of the Exchequer. This office had been held by the plaintiff, but he, on the making of this bargain, resigned it, and procured the situation for the defendant. There were several special pleas; and on the pleadings three questions were raised—*First*, whether this was an office touching the administration of justice, and therefore not legally saleable. *Secondly*, whether it was an office touching the receipt of the public revenue,

If, a covenant is entered into, that if the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the emoluments; and this be without the knowledge of the person who has the right of appointing to the office; this is such a fraud on him as will avoid the covenant,

whether the office is one lawfully saleable or not.

1825.
 WALDO
 v.
 MARTIN.

and therefore not saleable (a). *Thirdly*, whether this bargain was made without the knowledge of Mr. Farrer who had

(a) By the stat. 5 & 6 Edw. 6, c. 16, it is enacted,—§ 2. ‘ That if any ‘ person or persons at any time ‘ hereafter bargain or sell any ‘ office or offices, or deputation of ‘ any office or offices, or any part ‘ or parcel of any of them, or receive, have or take any money, ‘ fee, reward, or any other profit ‘ directly or indirectly, or take any ‘ promise, agreement, covenant, ‘ bond, or any assurance to receive or have any money, fee, ‘ reward or other profit, directly ‘ or indirectly, for any office or ‘ offices, or for the deputation of ‘ any office or offices or any part ‘ of any of them; or to the intent ‘ that any person should have, ‘ exercise or enjoy any office ‘ or offices, or the deputation ‘ of any office or offices or any ‘ part of any of them; which ‘ office or offices, or any part ‘ or parcel of them, shall in any ‘ wise touch or concern the administration or execution of ‘ justice, or the receipt, controlment or payment of any of the ‘ king’s highness treasure, money, ‘ rent, revenue, account, aulnage, ‘ auditorship or surveying of any ‘ of the king’s majesty’s honours, ‘ castles, manors, lands, tenements, ‘ woods or hereditaments; or any ‘ of the king’s majesty’s customs, ‘ or any other administration or ‘ necessary attendance to be had, ‘ done or executed in any of the ‘ king’s majesty’s custom-house ‘ or houses; or the keeping of any ‘ of the king’s majesty’s towns, castles or fortresses, being used, occupied or appointed for a place of

‘ strength and defence; or which ‘ shall concern or touch any clerkship to be occupied in any manner of court of record, wherein ‘ justice is to be ministered; that ‘ then all and every such person ‘ and persons that shall so bargain or sell any of the said office ‘ or offices, deputation or deputations, or that shall take any ‘ money, fee, reward or profit, for ‘ any of the said office or offices, ‘ deputation or deputations of any ‘ of the said offices, or any part ‘ of any of them, or that shall ‘ take any promise, covenant, ‘ bond or assurance for any money, reward or profit, to be given for any of the said office or ‘ offices, deputation or deputations of any of the said office or ‘ offices, or any part of any of ‘ them, shall not only lose and forfeit all his and their right, interest and estate which such ‘ person or persons shall then ‘ have, of, in or to any of the said ‘ office or offices, deputation or ‘ deputations, or any part of any of ‘ them, or of, in or to the gift or ‘ nomination of any of the said ‘ office or offices, deputation or ‘ deputations, for the which office or offices, or for the deputation or deputations of which ‘ office or offices, or for any part ‘ of any of them, any such person or persons shall so make ‘ any bargain or sale, or take or ‘ receive any sum of money, fee, ‘ reward or profit, or any promise, ‘ covenant or assurance to have ‘ or receive any fee, reward, money or profit: but also that all

the right of appointing to this office, and therefore was so much in fraud of Mr. Farrer, as to make the bargain void.

1825.
WALDO
v.
MARTIN.

‘ and every such person or persons, that shall give or pay any sum of money, reward, or fee, or shall make any promise, agreement, bond or assurance for any of the said offices, or for the deputation or deputations of any of the said office or offices, or any part of any of them, shall immediately by and upon the same fee, money or reward given or paid, or upon any such promise, covenant, bond or agreement had or made for any fee, sum of money or reward to be paid as is aforesaid, be adjudged a disabled person in the law, to all intents and purposes, to have, occupy or enjoy the said office or offices, deputation or deputations, or any part of any of them, for the which such person or persons shall so give or pay any sum of money, fee or reward, or make any promise, covenant, bond or other assurance, to give or pay any sum of money, fee or reward.’

And by § 3, it is enacted, That all and every such bargains, sales, promises, bonds, agreements, covenants and assurances as be before specified, shall be void, to and against him and them by whom any such bargain, sale, bond, promise, covenant or assurance shall be had or made.’

But as to government offices and offices in the gift of the East India Company, this statute is much extended by the stat. 49 Geo. 3, c. 126, which enacts,—§ 1. ‘ That the said act and all the provi-

sions therein contained, shall extend and be construed to extend to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown, and all commissions, civil, naval or military, and to all places and employments, and to all deputations to any such offices, commissions, places, or employments in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master general and principal officers of his majesty’s ordnance, the commander in chief, the secretary at war, the paymaster general of his majesty’s forces, the commissioners for the affairs of India, the commissioners of the excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary-general, the storekeeper-general, and also the principal officers of any other public department or office of his majesty’s government in any part of the united kingdom, or in any of his majesty’s dominions, colonies, or plantations which now belong or may hereafter belong to his majesty, and also to all offices, commissions, places and employments belonging to or under the

1825.
 WALDO
 v.
 MARTIN.

Evidence was given to shew clearly, that the office was not one touching the administration of justice; but, on the second point, it was proved that the officers of the Pipe-office receive certain arrears of taxes from the sheriffs of the different counties at the Pipe-office in Somerset House, which money so received, it is the duty of the bag-bearer to carry to the Receipt of the Exchequer at Westminster. On the third point, Mr. Farrer was called: he stated that he was first secondary in the Pipe-office; and that, as

‘ appointment or control of the
 ‘ united company of merchants of
 ‘ England trading to the East In-
 ‘ dies, in as full and ample a man-
 ‘ ner as if the provisions of the
 ‘ said act were repeated as to all
 ‘ such offices, commissions, places,
 ‘ and employments, and made
 ‘ part of this act; and the said
 ‘ act and this act, and all the
 ‘ clauses and provisions therein
 ‘ respectively contained, shall be
 ‘ construed as one act, as if the
 ‘ same had been herein repeated
 ‘ and re-enacted.’

And by the latter sections of this act, all persons concerned in transactions of this sort, as buyers, sellers, agents, &c. are to be deemed guilty of a misdemeanor; but there is a proviso that this act is not to extend to sales of commissions and appointments in the band of gentlemen pensioners, or the yeomen of the guards, or in the marshalsea, or the palace court, or to commissions in his majesty’s forces according to regulations. And it is provided by § 10, that ‘ nothing in this act con-
 ‘ tained shall extend or be con-
 ‘ strued to extend to prevent or
 ‘ make void any deputation to any
 ‘ office, in any case in which it is

‘ lawful to appoint a deputy, or
 ‘ any agreement, contract, bond,
 ‘ or assurance lawfully made in
 ‘ respect of any allowance, salary,
 ‘ or payment made or agreed to
 ‘ be made by or to such principal
 ‘ or deputy respectively, out of the
 ‘ fees or profits of such office.’

And by § 11. ‘ That nothing in
 ‘ the said act or in this act contain-
 ‘ ed shall extend to any annual re-
 ‘ servation, charge, or payment
 ‘ made or required to be made out
 ‘ of the fees, perquisites, or profits
 ‘ of any office to any person who
 ‘ shall have held such office, in any
 ‘ commission or appointment of
 ‘ any person succeeding to such
 ‘ office, or to any agreement, con-
 ‘ tract, bond, or other assurance
 ‘ made for securing such reserva-
 ‘ tion, charge, or payment: pro-
 ‘ vided always, that the amount of
 ‘ such reservation, charge, or pay-
 ‘ ment, and the circumstances
 ‘ and reasons under which the
 ‘ same shall have been permitted,
 ‘ shall be stated in the commis-
 ‘ sion, patent, warrant, or instru-
 ‘ ment of appointment of the per-
 ‘ son so succeeding to and hold-
 ‘ ing such office, and paying or
 ‘ securing such money as afore-
 ‘ said.’

such, he had the right of appointing the bag-bearer; and that, on the resignation of the plaintiff, he appointed the defendant, at the solicitation of the plaintiff; but that he knew nothing of this bargain relative to the profits; and that he highly disapproved of it, on discovering that it had taken place. Mr. Farrer, however, stated that he had known the Pipe-office for eighty years, having been appointed to a situation in it in the year 1745, and that he had known this office of bag-bearer sold more than once. It was an office held for life.

1825.
WALDO
v.
MARTIN

BAYLEY, J.—It is proved that Mr. Farrer did not know of this bargain, and there is, therefore no doubt that the defendant was appointed by a fraud on Mr. Farrer.

Denman.—But if this is an office legally saleable, I submit, that Mr. Farrer's knowledge of the bargain is immaterial.

BAYLEY, J.—I think not.

The learned Judge directed a

Nonsuit.

Denman and **Brougham**, for the plaintiff.

Scarlett and **Chitty**, for the defendant.

[Attornies—*W. Roberts* and *Hurd & Johnson.*]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JJ.
In Bank.

Denman moved for a rule nisi, for a new trial, and argued, that this was an office legally saleable, and cited *Sparrow v. Reynold*, 26 Car. 2, in C. B. Bac. Abr. tit.

June 7th.

1825.
 WALDO
 v.
 MARTIN.

Officer, (F); *Godbolt's case*, 6 Leon. 33; and *Blankard v. Galdy*, 4 Mod. 223 (b).

(b) In the case of *Sparrow v. Reynold*, it was said, that a seat in the six clerks office is a saleable office, as being ministerial only. But that one judge thought the sale bad at common law, as against public policy. In *Godbolt's case*, the sale of the office of bailiff of a hundred, was held not to be within the statute. *Blankard v. Galdy*, was the case of a provost marshal of Jamaica, but the court did not decide whether his was an office touching the administration of justice, the case being decided on the ground that the stat. of Edw. 6, did not extend to the colonies.

In Dr. *Trevor's case*, it was resolved by the judges, on a reference to them by the Lord Chancellor, that the offices of chancellor, registrar, and commissary in Ecclesiastical Courts, are within the stat. 5 Edw. 6, because they 'concern matters about matrimony, and legitimation, which touch the inheritance of the subjects, and about matters of legacy for chattels real and personal; and in that respect are Courts of Justice; and therefore the offices in these courts are within the stat.' Cro. Jac. 269; & 12 Co. 78, S. C.

On the question, what amounts to a sale.—In the case of *Culliford v. Dr. Pardonell*, 2 Salk. 466, it was held, that a bond by a deputy to pay half the profits of his office to his principal, was not within the statute; as that was in effect giving the deputy the other

half as a salary for his services. And in *Godolphin v. Tudor*, 2 Salk. 468, and 6 Mod. Rep. 234, (but which is best reported from a MS. of C. J. Willes, in Willes, Rep. by Durnford, 575, n.) it was held, after three arguments, that if an officer has certain annual profits, a deputation of his office, reserving any sum not exceeding the amount of the certain profits, is not contrary to the statute. So, if the profits be uncertain, and the deputy be to pay so much out of the profits. But if the office consist of uncertain profits, and the deputy be to pay a sum certain annually, this will be a sale within the statute. And the case is not altered by the office answering more in contingent profit, than the money stipulated to be paid.

In *Huggins v. Bainbridge*, Willes, 241, it was held, that a bargain, that the plaintiff should surrender the office to the king, to the intent that the plaintiff should procure it for the defendant, is void within the statute. And in *Layng v. Paine*, Willes, 571, a bond to resign, whenever the person appointing chose, was held void.

As to agreements for the sale of such offices which are not within the statutes, being void as against public policy; see *Parsons v. Thomson*, 1 H. B. 322. *Garforth v. Fearon*, 1 H. B. 327. and *Haneington v. Duchatel*, 1 Br. Ch. Ca. 124.

ABBOTT, C. J.—Supposing that this is a saleable office, and that it was procured by purchase, Mr. Farrer not knowing of the bargain, is not that such a fraud on him as will avoid the bargain?

1825.
WALDO
v.
MARTIN.

Denman then went on certain affidavits, which tended to shew that Mr. Farrer was mistaken, and that he really did know of the bargain, but had forgotten it: however, that was not at all clearly shewn.

ABBOTT, C. J.—I think that there should be no new trial in this case, for without considering whether the office touches the administration of justice or the public revenue, this agreement being entered into without the knowledge of Mr. Farrer, is such a fraud on him as will make that agreement void, and unavailable in point of law; as when Mr. Farrer appointed to the office, he considered that the appointee was to have the profits; and by this agreement, that is not to be so; and by those means he is made to appoint to the office for the profit of a person whom he does not intend. I think, therefore, the nonsuit was right.

HOLROYD, J.—I think the circumstances attending this bargain are such as to make it unavailable, on the ground that it was in fraud of Mr. Farrer.

LITTLEDALE, J.—Concurred.

Rule refused.

=====

1825.

Sittings in London, after Easter Term, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

May 18th.

BAROUGH v. WHITE.

The declarations of a former holder of a promissory note payable on demand, made while he was the holder, are not evidence for the defendant in an action by a subsequent holder, unless the note had been presented for payment before such declarations were made.

ASSUMPSIT on the joint and several promissory note of the defendant and his brother, dated September 20, 1823, and payable on demand to a person named Arnet, who had indorsed it to the plaintiff. The formal proofs having been adduced for the plaintiff—

Cross, Serjt. and *Archbold*, for the defendant, wished to give in evidence a conversation of Arnet, which occurred at the time when he was the holder of the note, impeaching its consideration.

Scarlett, for the plaintiff, objected, that the declarations of Arnet were not evidence, because the only case in which the declaration of the holder of the bill is evidence, is when such bill is indorsed after it is over-due.

Cross, Serjt., and *Archbold*.—This being a note payable on demand, it is in the same situation, and is governed by the same rules as a bill over-due. And they cited *Brown v. Davis*, 3 T. R. 80.

ABBOTT, C. J.—Can you shew a demand of payment before this conversation with Arnet? as that would place this note in the situation of a bill over-due.

Cross, Serjt.—My Lord, I cannot: but I am in a condition to shew that the note was in the possession of Arnet, at the time of the conversation.

Scarlett.—If a man takes a bill over-due, he sees that it is so; but with a note like this, the defendant would have all the same advantage on the day after it was signed, that he would a year afterwards.

1825.
BROUGH
v.
WHITE.

ABBOTT, C. J.—I am of opinion that the evidence offered is not admissible.

Verdict for the plaintiff.

Scarlett and *Brougham*, for the plaintiff.

Cross, Serjt., and *Archbold*, for the defendant.

[Attornies—*Smith & S.* and *Lever*.]

In the ensuing Term, *Cross*, Serjt., moved for a rule nisi, to set aside the verdict, on the ground that the declarations of Arnet were improperly rejected at the trial; and he cited the case of *Pocock v. Billing*, ante, 230, but the Court refused the rule.—ABBOTT, C. J. observing, that the Court considered that the observations of the Court of Common Pleas as to the declarations of the holder of a bill, were, to a certain extent, extra-judicial, as that point was not at all brought into question in that case.

The case of *Taylor v. Mather*, 3 T. R. 83, n. was an action by the indorsee of a note against the maker. It was indorsed after it was due, and there was evidence given that the note had been originally obtained by fraud. *Buller*, J. said, it never has been determined that a bill or note is not negotiable after it is due, but if there are any circumstances of fraud in the transaction, and it is indorsed to the plaintiff after it is due, I have always left it to the jury, on the slightest circum-

stances to presume that the indorser was acquainted with the fraud; and the rest of the court concurred in this opinion.

In *Brown v. Davies*, 3 T. R. 80, *Ashurst*, J. held, that the circumstance of a bill or note being over-due is alone such a suspicious circumstance, as to make it incumbent on one to satisfy himself that it is good; and *Buller*, J. held, that if a note were over-due (though his Lordship would not say that it was not by law negotiable), that gave rise to suspi-

1825
 BAROUGH
 v.
 WHITE.

cion; but generally, when a note was due, the party receiving it, took it on the credit of the person he received it from. Lord *Kenyon*, C. J. agreed to this, if the note appeared on the face of it to have been dishonoured, or if knowledge could be brought home to the indorser that it had been so; but his Lordship added, "I should think otherwise if notice cannot

be fixed on the party; at least I am not prepared to go that length at present."

And Mr. Justice *Bayley*, in his work on Bills of Exchange, (page 118), lays down, that "a man who takes a bill after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the person from whom he takes it."

Adjourned Sitzings at Westminster, after Easter Term, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

May 21st.

REX v. WIBLIN.

Practice—Scire facias on a forfeited recognizance. Mode of proceeding.

SCIRE facias. The writ of *scire facias* stated that the defendant had before a magistrate entered into a recognizance in the sum of 20*l.* to keep the peace for one year towards all his majesty's subjects: it then suggested that he had since that time, and within the year, assaulted John Tomlins and Susannah Tomlins; and the sheriff was commanded to make it known to the defendant that he might shew why the said sum should not be levied on him.

Plea, that the defendant ought not to have the sum levied on him, because he was not guilty of those assaults on which issue was joined.

Evidence was adduced to shew that he had committed those assaults.

Verdict for the crown.

Gurney and Steer for the crown.

The defendant in person.

[Attornies—*Harmer* and *In person.*]

1825
 }
 · **REX**
 v.
WIBLIN.

When a person has entered into a recognizance to keep the peace, which becomes forfeited by his committing any breach of the peace; if it was acknowledged at the sessions, or before a magistrate, a writ of *certiorari* must be obtained to remove it into the crown-office. This writ is obtained on laying an affidavit of the circumstances before a judge at chambers, who will grant a fiat for the writ to issue; when the writ has been served, and the recognizance is returned, a writ of *scire facias* is sued out at the crown-office, stating the recognizance, and suggesting the breach of it. This is delivered to the sheriff of the county in which the defendant resides, and he gives notice of it to the defendant, who must enter an appearance in the crown office, and plead any matter in defence;

and on this issue is joined, and that issue tried in the same way as any other issue joined in the crown-office, except that no proclamation is made at the trial, there being no crime to be tried. If the jury find that the recognizance has been forfeited, they find a verdict for the crown, and judgment is entered up, and a *fi. fa.* or *ca. sa.* issued out of the crown-office for the amount of the recognizance; but if to those writs there be a return of *nihil* or *non est*, or if the prosecutor takes no steps on the judgment so signed, the recognizance is estreated into the Exchequer by the master of the crown-office, in the same way as a recognizance forfeited by the non-appearance of a party to receive judgment; and process on it issues from the Exchequer.

Adjourned Sittings in London after Easter Term, 1825.

DOWNE v. HALLING and Others.

May 28th.

MONEY had and received, This action was brought to recover the value of a check, dated the 16th of Novem-

The plaintiff having lost a check five days after it bore

date, which was taken by the defendants for value, but under such circumstances as ought to have excited their suspicion, held, that the plaintiff may maintain an action for money had and received against them for the amount of it, *though he gives no evidence of how he lost it, or of how it got out of his possession.*

Whether such evidence would have been necessary, if the check had been received by the defendants on the day it bore date.—*Quare.*

1825.
Downe
v.
HALLING.

ber, 1824, for 50*l.* drawn on Sir P. Pole & Co., payable to the plaintiff, or bearer.

It was stated and proved, that the plaintiff had received this check from his brother, Mr. Edward Downe; and it was opened that it had either been lost by, or stolen from the possession of, the plaintiff's wife, at a shop in the Royal Arcade (but of the loss no evidence was given); and it was proved by the admission of one of the defendants, and by the evidence for the defence, that the defendants were linen drapers, carrying on extensive business in Cockspur-street, London, and that, on the evening of the 22d of November, 1824, they received this check in payment for two shawls, of the price of 6*l.* 6*s.*, and that they gave 43*l.* 14*s.* cash in change. They received it from a woman, who gave her address as "Mrs. Jones, Leader-street, Brompton;" but they did not know her. This person stated that she could not write well; and the defendant's shopman wrote that address on the back of the check. It further appeared, that this person came alone to the shop, and not in a carriage, but that her appearance was respectable; and that on the check being shewn to one of the defendants, for the purpose of examining whether it was forged, he said, they might take it and give the change. It was also proved, that on one of the defendants, being asked whether they were in the habit of receiving checks of strangers, he said that they never did so, unless it was of a person who came in a carriage, or who appeared to be highly respectable, or who laid out a great part of the amount in goods; and it was also proved, that, on the morning after the defendants received the check, they sent a person with it to Sir P. Pole & Co.'s bank, and got a 50*l.* note for it, which note they paid into their own banker's hands, instead of paying the check into their banker's hands, and letting them get cash for it, as was their custom, and as they did with several other checks on the same day; and their own banker's counting-house being rather nearer to the defendant's house of business than that of Sir P. Pole & Co.

Under these circumstances it was contended, on the authority of the case of *Gill v. Cubitts*, ante, vol. I. p. 163, 487, that the defendants had used so little caution in the taking of this check, and that the fact of its being so many days after date, coupled with the other circumstances of the case, ought to have excited such a suspicion in their minds, as to have caused them either to refuse to take the check, or to do so at their own risk.

1825.
Downe
v.
Hallings.

Denman, for the defendants, argued, that the action was not maintainable, as the very foundation of it was the check having been stolen or lost: now, there was no evidence of either; and, for aught that appeared, the plaintiff might himself have paid it away for value.

Scarlett.—My answer to this is, that we prove the check to be ours, and call on the defendants to shew how they got it.

Denman.—It is payable to bearer.

ABBOTT, C. J.—I do not think I ought to nonsuit.

Denman then addressed the jury, and argued, that checks were often in circulation for a considerable number of days; and this being payable to bearer, it carried its own authority with it, unless there were some circumstances to take it out of the general rule: and the question for them was, whether the defendants had given value for the check, and had acted *bond fide*; and as to the supposed negligence of the defendants, they could at most have only used this additional caution, that if it had not been paid to them at the banking-house, (which it was), they might have sent to Sir P. Pole's banking-house to know if it was a good check, and would be paid: and that would have made no difference, as they would have been told that it was good.

1825.
DOWNE
v.
HALLING.

ABBOTT, C. J., in summing up the evidence to the jury, said, The plaintiff, who was owner of this check, alleges, that the defendants have received the money on it, having taken the check under such circumstances as might fairly excite suspicion in their minds; and if you are of opinion in point of fact that the defendants did take this check, under such circumstances as might fairly excite their suspicion, I am of opinion, in point of law, that the plaintiff is entitled to your verdict. I had the honour to lay that down in a case (*Gill v. Cubitts*) tried in this place, which has since received the sanction of the other judges. The defendants took this check on the evening of the 22nd of November; and there is no mark upon it except the address of Mrs. Jones. You are to say, whether they used due caution:—they take it of a woman they don't know, and who cannot write, or who can write but badly, and they take it for a small quantity of goods. The check is not drawn by her, nor is it even payable to a female: and you have it also in proof that the defendants send it next morning to the bankers on whom it is drawn, and not to their own bankers, as was their habit, but that they pay the proceeds into the hands of their own banker. The case has been very properly stated to be one where there is no imputation of the slightest fraud or collusion on the part of the defendants; but it is charged that they did not use due and proper caution: if so, the plaintiff is entitled to a verdict; but if you think that the defendants took this check in the fair course of trade, using as much caution as persons in the fair and ordinary course of business ought to do, you ought to find a verdict for the defendants.

Verdict for the plaintiff—Damages 50*l*.

Scarlett and *F. Pollock*, for the plaintiff.

Denman, for the defendants.

[Attornies—*Loddington & Hall* and *Amory & Coles*.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JJ.
In Bank.

1825.
DOWNE
v.
HALLING.

June 3rd.

Denman now moved for a new trial on two grounds. 1st, That the plaintiff ought to have been nonsuited, because no evidence was given of the manner in which the check got out of his possession; and, that for any thing that appeared, he might have himself paid it away for value: and 2nd, that the Lord Chief Justice ought to have left it to the jury to say, whether the defendants took the check for value, and *bona fide*. It was conceded at the trial, that the defendants had acted without the slightest *mala fides*; and the most that they were charged with was negligence. Now, this was introducing a new rule into the law, to admit *bona fides* in the defendants, and then put it on the ground of want of prudence and caution; he therefore contended that the case should not have been left to the jury on the question of negligence.

BAYLEY, J.—If a party takes a bill over-due, he takes it at his own risk.

Denman.—It is very common for checks to remain out for some time; but I was arguing that these parties acted *bona fide*, and that the question to be left to the jury ought to have been, whether there was *mala fides* in the defendants or not, which was not the way in which it is put to the jury. *Peacock v. Rhodes*, Dougl. 611.

BAYLEY, J.—It was left to the jury to say, whether the defendants had not received the check under such circumstances as would excite the suspicion of a reasonable man.

ABBOTT, C. J.—I did not put it on the ground of negligence, but whether the check was taken under circumstances of suspicion. On that point my Brothers are per-

1825.
 {
 DOWNE
 v.
 HALLING.

fectly satisfied. However, as there was no evidence of the loss of the check, but only that it was the plaintiff's property, we will defer our judgment; and if we should think that point ought to be further argued, we will grant a rule to shew cause.

BAYLEY, J.—Checks being intended for immediate payment, a check after date is like an ordinary bill past due.

June 14th.

The court now gave judgment on this motion.

ABBOTT, C. J.—The point raised by Mr. *Common Serjeant*, was whether it was necessary in this case for the plaintiff to shew how he lost this check. Mr. *Scarlett* said, it was proved to be the plaintiff's, and on that he relied. It was a check payable to bearer, which the plaintiff had received from his brother; and it also appeared that the defendant took it five days after date; and some of my Brothers consider this as exactly like the case of a bill over-due. That being so, it is not necessary to say whether the loser shall or shall not be in general required to shew how he parted with the possession; it is not necessary to lay down any general rule, but I should be very unwilling to lay down any general rule requiring the loser to give such evidence; as in almost all cases of property stolen from the person, or from the private *escrutoire*, nay, even in the case of cattle stolen from a field, it would be nearly impossible for any such proof to be given; but in this case, it being shewn that the defendants took this check five days after date, the plaintiff was entitled to call on them to shew how they came by it; we shall therefore grant no rule.

Rule refused.

See the cases of *Gill v. Cubitts*, ante, Vol. 1, p. 163, 487, and the notes to *Barough v. White*, ante, p. 8, and the cases of *Miller v.*

Race, 1 Burr. 452; *Grant v. Vaughan*, 3 Burr. 1516, and *Peacock v. Rhodes*, Doug. 611.

1825.

MILNER and Others v. MACLEAN and Others.

June 1st.

TRESPASS on the stat. 8 Hen. 6, c. 9. The first count of the declaration was for a forcible detainer of two closes, situate in the parish of St. Mary, Islington, and stated, after reciting the statute, &c. "that the defendants, *vi et armis*, broke and entered the said closes, and then and there, in a forcible manner, and with a strong hand, kept and continued the said plaintiffs, so put out and dis-seised, for a long space of time, to wit, &c." The second count was for a forcible entry; the third was a common count for a trespass; and the fourth for an expulsion. Plea—Not guilty.

To constitute a forcible entry, or a forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of persons and show of force, as is calculated to deter the right-ful owner from sending the persons away, and resuming his own possession.

It appeared, that the plaintiffs, being seised in fee of the ground in question, had entered into a treaty for the sale of it, with an intended company, called the Portable Gas Company; and in consequence of this, certain persons had, about the 13th of December, filed a bill for a specific performance of an alleged agreement to convey this property to them and others, for the purposes of that company: and on the 13th of December, 1824, six persons came on the ground, which was situate near Battle Bridge, at about eight o'clock in the morning, one of them having a drawn sword, which he placed upright in the ground; and they proceeded to drive pieces of wood into the ground, for the erection of two wooden huts. A person in the employ of the plaintiffs told them, they must not stay there; but they refused to go, and stated that they came there by order of the Portable Gas Company. On the next day, the plaintiffs' attorney, accompanied by another person, went to the place, and then found eleven persons there, some of whom were walking to and fro, and others were in the wooden huts which had been built; one of them had a sword, another a constable's staff, and some of the others sticks. They refused to give their own names, but

1825.
 MILNER
 v.
 MACLEAN.

gave the names of the three defendants, on whose behalf it was admitted that they were sent. These persons, or some of them, remained in the place day and night, and refused to depart, and two of the number were remaining there up to the time of the trial.

The defendants' counsel contended, that as there was no assault committed, and no actual violence used; this was only a trespass, and not a forcible entry or detainer.

ABBOTT, C. J.—In this case there was, it is true, no one assaulted, nor is it necessary that there should be, to constitute a forcible entry; for, if persons either take or keep possession of either house or land, with such number of persons, and show of force, as is calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer (a).

(a) Actions for forcible entry, and forcible detainer, are founded on the stat. 8 Hen. 6, c. 9, s. 6, which enacts 'that if any person 'be put out or disseised of lands 'or tenements in forcible manner, or put out peaceably, and 'after holden out with strong 'hand; or, after such entry, any 'feoffment or discontinuance in 'any wise thereof be made, to 'defraud and take away the right 'of the possessor; that the party 'grieved in this behalf shall have 'assise of *novel disseisin*, or a 'writ of trespass against such 'disseisor. And if the party 'grieved recover by assise, or by 'action of trespass, and it be 'found by verdict, or in other 'manner by due form in the law, 'that the party defendant entered with force into the lands

'and tenements, or them after 'his entry did hold with force, 'that the plaintiff shall recover 'his treble damages against the 'defendant; and moreover, that 'he make fine and ransom to 'the king. And that mayors, 'justices, or justice of peace, 'sheriffs, and bailiffs of cities, 'towns, and boroughs, having 'franchise, have in the said cities, 'towns, and boroughs, like power to remove such entries, and 'in other articles aforesaid, rising 'within the same, as the justices 'of peace and sheriffs in counties and countries aforesaid have. But by s. 7, it is provided "That 'they which keep their possessions with force in any lands 'and tenements, whereof they or 'their ancestors, or they whose 'estate they have in such lands

Verdict for the plaintiffs, damages 100*l.*(*b*), costs 40*s.*(*c*).

Scarlett, Brougham, Koe, and Evans, for the plaintiffs.

The Attorney-General and Campbell, for the defendants.

[Attornies—*Routledge and Gordon*.]

1825.

MILNER

v.

MACLEAN.

'and tenements, have continued
'their possessions in the same
'by three years or more, be not
'endamaged by force of this
'statute.'

Mr. Serjeant Hawkins lays down, (Curw. Hawk. title Forcible Entries, p. 501,) that wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they do not give way to him, his entry is forcible, whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force. And the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. (p. 502).

(*b*) The verdict was entered for 100*l.* damages, and 40*s.* costs, on the first and second counts, and a *nol. pros.* entered as to the other counts; and in the record, the plaintiffs prayed that their damages should be awarded by the Court according to the statute; and the Court adjudged that they should recover treble their damages, being 300*l.* and 188*l.* for their costs; which had been taxed by the master at the usual costs, *plus* half

those costs, *plus* half these latter. These damages and costs we have been informed have been since paid.

In 2 Inst. 416, it is laid down, that in cases of re-disseisin and post-disseisin on the stat. of West. 2, c. 26, (which gives double damages,) the jury is to give the single, and the Court to double them. In *Bumpstead's* case, Cro. Car. 448-9, the same is laid down as to treble damages, on the stat. of 28 Hen. 6, c. 10, (an act relating to the wages of knights of the shire); and the case of *O'Kelly v. Salter*, Yelv. 176, goes to the same point.

(*c*) Where a statute gives double or treble damages, where damages were recoverable before the act, the plaintiff not only recovers double or treble damages, but his costs are doubled or trebled also; but where, by a statute, double or treble damages are directed, where no damages were before recoverable, then the plaintiff recovers no costs; 2 Inst. 289; and *Wilkinson v. Allot*, Cowp. 368; as in actions for driving distresses out of the hundred. 2 Inst. 284.

In actions for forcible entry, the plaintiff recovers treble damages, and treble costs. 2 Inst. 289. *Robert Pilfild's* case, 10 Co. 115 b. *Skin v. Atkinson*, 1 Vent. 22. In *Turner v. Gallilee*, Hard. 152, it is said, that in forcible entry the

1825.
 MILNER
 v.
 MACLEAN.

plaintiff gets no costs; but the authorities above cited are all directly the other way. The costs *de incremento* are doubled or trebled as the case may be, as well as those found by the jury. *Thoroughgood v. Scroggs*, Cro. Eliz. 582. *Smith*, q.

t. v. *Dunce*, 2 Str. 1048.

It should be observed, that in all cases where double costs are given, they are the taxed costs and half of them, and treble costs are the costs taxed, the half of them, and half of these latter. Hul. C. 484.

COURT OF COMMON PLEAS.

Sittings in London, after Easter Term, 1825.

BEFORE LORD CHIEF JUSTICE BEST.

May 18th.

HADWEN v. MENDISABAL.

If a party receive bills of exchange for goods sold, and pay them away, but afterwards get them back, and they are, at the time of the trial of an action of *assumpsit* for the price of the goods, lying protested in the hands of his agent, he may recover the money due, without delivering up the bills, and the defendant must seek relief in equity, if they are not delivered up.

ASSUMPSIT for goods sold. A witness proved an admission of a balance due to the plaintiff for goods; but, from his cross examination, it appeared that bills of exchange had been given for these goods, which bills had been paid away by the plaintiff, but had been subsequently got back by him, and were, at the time of the trial, lying protested in the hands of his agent at Cadiz.

Pell and *Taddy*, Serjts., objected, that as the plaintiff had passed away the bills, he had made them his own, and could not recover for the goods sold without delivering them up.

BEST, C. J.—If the bills had gone from the plaintiff's control, the objection would be unanswerable. The plaintiff might have them here now, but you could not make him deliver them up till the payment of the money. If the bills are not forthcoming, you may have equitable relief in another place. A man having a bill may declare for

goods sold, saying, I will not go on the bill. The verdict must be for the plaintiff.

Verdict for the plaintiff.

1825.
HADWEN
v.
MENDISABAL

Vaughan, Serjt. and *F. Pollock*, for the plaintiff.

Pell and *Taddy*, Serjts. for the defendant.

[Attornies—*Nettleship* and *Freeman & H.*]

In the ensuing Trinity Term, *Pell*, Serjt. moved for a rule nisi for a new trial, and cited *Dangerfield v. Wilby*, 4 Esp. N. P. C. 159 (a).

But the Court said, there was no ground for the motion: *GAZELEE*, J. observing, you may at all times declare for the consideration of bills of exchange, and it is for the other party to shew that there were bills given, and that they had been honoured.

Rule refused.

(a) In that case it was ruled, that where a promissory note has been given for money due by the defendant to the plaintiff, who declares on it, with the money-counts, he must prove the note lost, or destroyed, before he can have recourse to the money-counts, if it appear that the money so claimed was that for which the note was given.

Adjourned Sittings at Westminster, after Easter Term, 1825.

THARPE, Esq. v. *GISBURNE*.

May 19th.

ASSUMPSIT for the keep of certain horses. The defendant's attorney was called to prove his signature to a paper:

them, it is sufficient to justify him in swearing as to his belief of the handwriting of such person.

If a party has received letters from another, and has acted on

1825.
 THARPE
 v.
 GIBBURN.

he said, he had never seen the defendant write, but that he believed this instrument to be of his handwriting from having received letters from him, upon which he had acted.

BEST C. J.—Held that this was quite sufficient for the witness to ground a belief upon, which was all that was required.

Verdict for the plaintiff.

Wilde, Serjt. and *Chitty*, for the plaintiff.

Vaughan, Serjt. and *Holt*, for the defendant.

[Attornies—*Bevan* and *Spencer*.]

In Phill. L. E. c. 8, § 2, the learned author says, that if a witness has received letters on subjects of business, which *can be proved* to have been written by a particular person, or letters of such a nature as makes it probable that they were written by the hand from which they profess to come, he may be admitted to speak to that person's handwriting; and the admissibility of the evidence must depend upon this, whether there is good reason to believe that the specimens, from which the witness has derived his knowledge, were written by the supposed writer of

the paper in question; and cites the cases of Lord *Fenns v. Shirley*, Fitzg. Rep. 195; *Laver's case*, 6 St. Tri. 275; and the case of the Seven Bishops, 4 St. Tri. 338; neither of which very explicitly decides this point; and in the latter case the judges were divided on it. But now the universal practice of the Lord Chief Justices at the Sittings is, if a witness states that he has received letters purporting to come from a party, and has acted on those letters, to ask him whether he believes the paper he is called to prove is of that party's handwriting.

May 19th.

HOULISTON v. SMYTH.

If a wife quits her husband's house, under a fair apprehen-

sion of personal violence, that is equivalent to her husband's turning her out of doors; and improper restraint of her person in a madhouse is, for this purpose, personal violence; and therefore a party supplying her with necessaries may recover for them against the husband.

If she quits her husband's house because he brought a common woman to reside in it, that is also a sufficient reason for her going: and if the husband is sued for necessaries supplied to her, it is no answer to the action that she had committed adultery previous to the credit being given, if the husband did not know it till after the credit, nor that after the credit she obtained a decree for alimony, which alimony was to relate back to a period before the credit.

ASSUMPSIT for the use and occupation by the defendant's wife, of certain rooms of the plaintiff, and for goods

furnished to her, and money lent. Plea—General issue. The action was brought for board and lodging furnished to the defendant's wife. From the evidence adduced for the plaintiff it appeared that the defendant had been seen in a threatening attitude, holding his fist in his wife's face, and that he had directed a servant to follow her and watch her conduct; he having had her confined some time previously in a private madhouse, from which she had been discharged after an examination before two of the Judges. It was proved also that the defendant had said to her, if she did not mind what she was about she should have "Mad Moll," to attend her again. In consequence of these things, she left the defendant's house, and went to the plaintiff's, where she lived for some time, and for part of that time payment had been made by the defendant's attorney, he himself being absent in Scotland.

1825.
 HOULISTON
 v.
 SMYTH.

Vaughan, Serjt. to rebut the charge of cruelty, produced evidence of acts, which, if true, undoubtedly shewed insanity on the part of the lady. But the credit of the witnesses was in the course of the cause very materially shaken. He also gave evidence of an act of adultery committed by Mrs. Smyth in the year previous to the time for which the plaintiff claimed; but it appeared that the defendant was not made acquainted with it till *after* all the credit had been given. *Vaughan*, Serjt. then proposed to give evidence of adultery committed in the month of December subsequent to the time of the credit.

BEST, C. J.—I think, that being after the time of the giving of the credit, it is not evidence.

Vaughan, Serjt.—I propose it with a view to shew that the wife's continuing conduct is an excuse for the husband.

BEST, C. J.—The receiving such evidence might give the husband, in some cases, the liberty to take advantage of

1825.
 HOULISTON
 v.
 SMYTH.

his own profligacy, as he might have driven her to such behaviour by his own bad conduct.

Vaughan, Serjt. then tendered in evidence certain letters purporting to be written by Mrs. Smyth to her husband, to rebut the charge of cruelty. They had no postmark.

Pell, Serjt. submitted that it must be proved when they were written.

Vaughan, Serjt.—If there be a date, it is only necessary to prove the handwriting.

If, to rebut the presumption that a wife left her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms are offered in evidence, it must be proved at what time they were written, or they are not admissible in evidence, and the dates of them are not sufficient proof of the times at which they were written.

BEST, C. J.—Generally speaking, that is correct. But where the letters of the wife are given in evidence in favor of the husband, you must prove when they were sent; because, after a reconciliation, husband and wife might contrive letters.

Pell, Serjt. cited *Edwards v. Crock*, 4 Esp. 39; Phil. L. E. 85 (a).

Vaughan, Serjt. and *Manning*.—These letters are admissible without further proof, because they would be so in a suit instituted by the wife for alimony; and an action like this by a tradesman is subject to the same rules as such a suit.

(a) The case of *Edwards v. Crock* was an action for crim. con. and the plaintiff and his wife having lived as servants in different families, letters written by the wife to the husband before any suspicion of a criminal intercourse, were admitted as evidence of her affection towards her husband. And in the later case of *Trelawney v. Coleman*, 1 B. & A. 90, it was

held, that letters written by the wife to the husband, and proved to have been written at the time they bore date, and long before she was suspected of adultery, were evidence of her affection towards her husband, although the cause of the husband and wife not then living in the same place was not shewn.

BEST, C. J.—I am clearly of opinion that they are not admissible.

1825.
HOULISTON
v.
SMYTH.

The defendant's attorney then proved that the letters were put into his hands by the defendant, in October or November, 1823. They were dated in October in that year. They were read; and in one of them, after alluding to some application for money at the Treasury, Mrs. S. observes, that if it could not be obtained without their appearing to be on good terms, she should recommend Mr. S. to say that they were so, and she would confirm it if necessary.

Vaughan, Serjt. also called the registrar of the Consistory Court at Doctors Commons, who produced the minute-book of that Court, containing the minutes of proceedings in that Court, commencing in the month of February, 1824; and also the minutes of a decree for alimony to Mrs. Smyth.

The minute-book of the Consistory Court is sufficient evidence of a decree for alimony pronounced in that court, without such decree being drawn up in form.

Maule, for the plaintiff, submitted, that minutes not reduced into a formal shape, could not be received in evidence.

BEST, C. J. was of opinion that they could; and the witness being asked, said, that nothing more is done with these minutes, unless the alimony is not paid.

The decreeing part of the minutes was then read; it was dated in December, 1824, and decreed alimony at the rate of 30*l.* *per annum*, to commence from the return of the citation, viz. the 8th of May, 1824.

Vaughan, for the defence, relied on the cases of *Govier v. Hancock*, 6 T. R. 603; *Nurse v. Craig*, 2 N. R. 148, and *Horwood v. Heffer*, 3 Taunt. 421 (*b*).

(*b*) In the case of *Govier v. Hancock*, the defendant having brought another woman into his house, turned his wife out of doors, the

1825.
 Heuliston
 v.
 Smyth.

An endeavour was made to prove a notice to the plaintiff (after the payment by the defendant's attorney before mentioned) not to trust Mrs. Smyth any more, but this failed.

Pell, Serjt. in reply. If a husband by cruelty drives his wife from his house, a notice not to trust her is of no effect. *Selwyn's L. N. P. 271.* The letters put in were evidently written to serve the defendant. And the payment by the husband's attorney up to a certain time is evidence, which, if there be no notice not to trust, would be sufficient to decide the cause. But allowing that there was such notice, there is enough in this case to justify the wife's leaving her hus-

wife committed adultery, and after that the plaintiff trusted her for necessities; the Court held that he could not recover.

In the case of *Nurse v. Craig*, the husband and wife having executed a deed of separation, by which the husband covenanted to pay a weekly sum to a trustee for her support, and failing to do so, the question was, whether the trustee could maintain an action of assumpsit for necessities supplied to her: *Heath, Rooke, and Chambre, Js.* held that he might; *Mansfield, C. J. contra.*

In *Horwood v. Heffer*, which was an action for necessities supplied to the defendant's wife, who had left her husband's house, the plaintiff relied on the fact of the husband having taken another woman into his house, with whom he cohabited, being a sufficient reason for his wife's leaving it. On *Best*, Serjt. applying for a new trial, *Lawrence, J.* said, "you did not state any apprehension of her personal

safety, you principally dwelt on the circumstance of the defendant's having placed a profligate woman at the head of his table, and having told the wife, that if she did not like to dine there, she might dine in her own chamber. I thought that, however improper that conduct might be, and however abhorrent from the feelings of a delicate woman, she might nevertheless have had necessities, if she had staid there; she might, if she had thought fit, have sued for alimony, and a divorce *a mensâ et thoro.*" And *Mansfield, C. J.* said, "If this suit were maintainable, it would be necessary that the jury should, in the first place, determine whether the wife lawfully left her home or not. This would wholly supersede the necessity of a suit for alimony, or a divorce *a mensâ et thoro.* I think nothing short of actual terror and violence will support this action."

This case, it will be seen, is now over-ruled.

band; and therefore, the plaintiff who took her into his house, is entitled to recover in this action.

1825.
Houlieton
v.
Smyth.

BEST, C. J.—This is an action brought by the plaintiff, who is a lodging-house keeper, against the defendant, who has an office in the Exchequer, to recover a sum of money for board and lodging furnished to the defendant's wife. A man in the plaintiff's situation cannot recover, unless the wife be at his house with the assent of the husband, or unless the husband drives her from her home by cruelty, personal violence, or that which shall excite reasonable fear of personal violence, for in such case he sends her out with a general credit. The plaintiff puts his case on the grounds of both assent and cruelty. He says to the defendant, you have paid me to a certain time, and from that your assent may be presumed. If acts of personal violence had occurred immediately about the time of leaving, though not at the moment, that is ground for presuming that the leaving was on their account. It is proved, that a servant had directions to watch Mrs. Smyth and follow her about, and that Mr. Smyth shook his fist in her face, and told her, she should have had Molly to attend her again. These things would give her reason to fear personal violence; and if so, she had a right to leave. I think that personal restraint includes personal violence. The payment made by the defendant's attorney, up to the 12th of May, allows that she was at the plaintiff's correctly up to that time. I entirely subscribe to the doctrine in the case of *Govier v. Hancock*. If a woman, though provoked by the bad conduct of her husband, actually commits adultery, he is not liable for her support; but that law does not apply to this case. The adultery proved here took place in the year 1823, (the credit beginning April, 1824,) but the adultery was not disclosed to the husband till the autumn of 1824, at which time no more credit was given by the plaintiff. This act of adultery in 1823, the husband not knowing it, but holding her out as fit to be maintained in 1824,

1825.
 HOULISTON
 v.
 SMYTH.

will not destroy the plaintiff's right to recover. There is no case to this effect. If a man, knowing of the commission of adultery by his wife, turns her out of his house, he gives her no credit; but not otherwise. As to the case of *Horwood v. Heffer*; In that case I moved for a rule to shew cause why there should not be a new trial, and *Mansfield*, C.J. confirmed the ruling of Mr. J. *Lawrence*. I was dissatisfied with the decision at the time, and have continued so ever since; and if this case had come to that point, I had determined to have it reconsidered: my Lord Chief Justice *Mansfield* in that case said, you must go to Doctors Commons; and I consider that to be wrong, because alimony might not be obtained in less than six months, and the party in the mean time might starve.

Verdict for the plaintiff.

Pell, Serjt. and *Maule*, for the plaintiff.

Vaughan, Serjt. and *Manning*, for the defendant.

[Attornies—*Frowd & R.* and *Murray & Son.*]

June 7th.

In the ensuing Trinity Term, *Vaughan*, Serjt. moved for a new trial, on the ground of the misdirection of the Lord Chief Justice at the trial, contending that the evidence which had been given of adultery was sufficient to prevent the defendant's being liable; and also that the decree for alimony, though made subsequently to the expiration of the credit, yet having a reference back, would discharge the husband from the effect of any supposed credit; otherwise he would be paying double in respect of the same time.

PARK, J.—Is the wife to starve while the Court is considering whether she shall have alimony or not?

Vaughan, Serjt. then went on the ground that his Lord-

ship, in summing up, had put the case too broadly, when he said, that reasonable suspicion of violence was enough to justify a woman in quitting her husband's house. He cited *Horwood v. Heffer* as an authority in his favour.

1825.
HOULISTON
v.
SMYTH

[BEST, C. J.—Are you aware of a late case in which Lord *Ellenborough*, at N. P. expressly over-ruled *Horwood v. Heffer*, and nobody has questioned his decision. I allude to the case of *Aldis v. Chapman*, Selwyn's L. N. P. 281 (c).]

Vaughan, Serjt.—If she fears confinement, she may apply for a *habeas corpus*, or may exhibit articles of the peace in case of violence. No case has gone so far as to say that *reasonable suspicion* is enough, and this would give her an opportunity of going away under pretence of fear.

BEST, C. J.—There is not the least pretence for disturbing the verdict; the only ground of misdirection is this, that I told the jury, that if Mrs. Smyth had reasonable ground to suspect personal violence, she had a right to absent herself from her husband's house, and the plaintiff had a right to recover. In the case of *Horwood v. Heffer*, Mr. Justice *Lawrence* observed to me, you did not rely on any threats of personal violence. Where, therefore, threats

(c) In that case it was ruled, that "where a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries, *e. g.* medicines in sickness during the separation."

It should also be observed, that when a husband improperly turns his wife away, notice to a tradesman not to trust her with necessa-

ries, is of no avail on his part, and in the case of *Boulton v. Prentice*, (Selw. L. N. P. 281), it was resolved by the Court, that although the prohibition (from trusting her) continued in force during cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away, and refused to maintain her.

1825.
 Howlston
 v.
 Smith.

of personal violence are used, Mr. Justice *Lawrence's* authority is in my favour. A woman is not bound to wait till she is actually treated with cruelty: my brother *Vaughan* says, that if my doctrine is correct, a woman may leave under a pretence of fear, but it is not so; for the jury are to judge whether the circumstances justified her leaving or not. I said at Nisi Prius, that I should like to have *Horwood v. Heffer* over-ruled; since then Lord *Ellenborough's* opinion, in opposition to that case, has been shewn me; and if I had known of that at the time, I would have ruled that *Horwood v. Heffer* was not law, it being against the first principles of morality. I was really shocked at the doctrines laid down in that case. Is a woman to remain within walls which contaminate her? If she did, undoubtedly, no Court would befriend her. She must shew herself virtuous, she must separate herself *pro salute animæ*. But this case goes beyond that, for here there were threats of personal violence. I am of opinion, that there is no foundation for this application. With respect to the adultery, there is nothing in the objection. If a woman is caught in adultery, and turned out of doors in consequence, then no credit is given her; but where she leaves from fear of violence, and not on account of adultery, because the adultery was not known, and a credit is given by payment by the husband, and no notice not to trust, the case is altogether different. As to the alimony also that is no answer to the action, for a woman might be starved while a suit for alimony is pending.

PARK, J.—I am of the same opinion. There is no colour for the interference of the Court. With respect to the decision in *Horwood v. Heffer*, I am surprised at the language of that case. Taken to its full extent, it is abhorrent to every feeling of a man, and every duty of a moralist and a Christian; for it is said, that although a husband places a profligate woman at the head of his table, and tells his wife that she may dine in her own room, yet she is not jus-

tified in quitting his house, but should sue for alimony or a divorce *a mensâ et thoro*. Is the mistress of a family to give way to a common prostitute? I have no difficulty in saying that that case cannot be the law of England, because it is not the law of morals and religion: I prefer the language of Lord Kenyon, who says (*d*) that, where a wife's situation in her husband's house is rendered unsafe by his cruelty or *ill treatment*, it is equivalent to his turning her out of his house; and that the husband is liable for necessities furnished to her under these circumstances.

1825.

 HOULISTON
 v.
 SMYTH.

BURROUGH, J.—The only question is, whether Mrs. Smyth had reason to apprehend personal violence. There is express evidence of holding up the hand in a menacing attitude, and of a threat to send her to a madhouse. It appears that she had been improperly sent to one before; and that, in my opinion, was ground enough for the jury to find that she had reasonable cause for leaving her husband. It was a matter to be left to the jury, it was left to them in a proper manner, and they have returned a proper verdict.

GAZELEE, J.—It is not necessary to ascertain what kind of violence is enough, in general; for it is impossible to doubt, that the threat of sending to a madhouse is quite sufficient. The jury have found that she had reasonable fear of this. It is not necessary particularly to enter into the case of *Horwood v. Heffer*, but I confess I am surprised at the doctrines it contains. I have always understood, that if a man by his conduct rendered his house unfit for a modest woman to remain in, she was entitled to leave it, and he thereby gave her a credit.

Rule refused.

(*d*) In the case of *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

1825.

May 21st.

If a trader, who is in the rules of the K. B. prison, come to his own shop out of the rules, and is there denied to a clerk of a creditor, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual; it is proper to be left to the jury to say, whether the bankrupt had himself denied, to delay his creditor, or whether it was because the clerk called at an unseasonable hour.

HUGHES v. GILLMAN and Others.

TRESPASS by a bankrupt against his assignees. The real question was, whether the plaintiff had committed an act of bankruptcy on the 1st of February. It appeared that he was in the rules of the King's Bench Prison; but that on that day he came to his own shop, which was out of the rules, and remained there all night. After the shop was shut in the evening, the clerk of a creditor called, and the bankrupt was denied to him. It had been proved that some conversation had taken place on the previous day, from which the bankrupt might reasonably conclude that the clerk would call for money.

Pell, Serjt. objected, that the clerk's calling after the shop was shut was unseasonable, and that a denial at such a time was no evidence of an act of bankruptcy.

The witness (a female servant) who proved the denial, on being examined further, stated, that the shop on that evening was shut earlier than usual.

BEST, C. J.—Upon this evidence left it to the jury to say, whether the denial was for the purpose of delay, or because the hour was unseasonable; and whether the shutting of the shop earlier than usual was not to enable the bankrupt the better to deny himself to the clerk, whom he had reason to expect would call.

The jury found for the defendant, thereby establishing the act of bankruptcy.

June 7th.

In the following Trinity Term, *Pell*, Serjt. moved for a new trial, on the ground that it had not been left to the

jury to say, whether the plaintiff was not concealing himself; because he ought not to have been found at any place out of the rules. But the court refused his application, and held that the case was properly left to the jury.

1825.
HUGHES
v.
GILLMAN.

Pell, Serjt. *Blackburn*, and *Brodrick*, for the plaintiff.

Wilde, Serjt. and *Adolphus*, for the defendants.

[Attornies—*Brewer*, and *Bartlett & B.*]

HALL v. DAVIS.

May 27th.

ASSAULT. Pleas—Not guilty, and a justification of “*molliter manus*” in order to remove the plaintiff from a house of which the defendant *was possessed*. It appeared that the house in question was under repair, and that nobody lived in it. The defendant was a carpenter, and one of his servants had the key to let himself in to work early in the morning. The plaintiff was also a workman of the defendant’s.

Assault by a master on his servant. Justification of *molliter manus* to remove him from a house of which the master *was possessed*. Held, that evidence of another servant of the defendant’s having the key to let himself in to work, nobody living in the house, is sufficient evidence of the defendant’s possession as against the plaintiff, to support the plea.

Wilde, Serjt. submitted that the allegation, that the defendant was possessed of the house, was not sufficiently proved. The owner by lending the key could only intend to give the means of access and not possession.

BEST, C. J.—Though as against the owner the defendant certainly had not possession, yet as against his own servants he had.

Wilde, Serjt. and *Barnewell*, for the plaintiff.

Pell and *Peake*, Serjts. for the defendant.

[Attornies—*D. Shuter*, and *Blacklow*.]

1825.

May 27th.

SPOONER v. BREWSTER.

Trespass, and not case, is the proper form of action for taking away a tomb-stone from a church-yard, and obliterating an inscription made upon it.

After a man's return from transportation he may maintain trespass for injury done to a tomb-stone erected by his wife during his absence.

TRESPASS. The declaration stated that the defendant, with force and arms, &c. seized, cut, damaged and destroyed divers tomb-stones and grave-stones of the plaintiff's, &c. and with divers instruments cut out and erased therefrom divers inscriptions, letters and figures, &c. upon the said tomb-stones, &c. and greatly defaced the same, and took and carried away the same tomb-stones, &c. and converted and disposed thereof to his own use. Plea—Not guilty.

The plaintiff had been transported for seven years, and during his absence his daughter, who married a person named Gravenor, died, and the plaintiff's wife caused her to be buried, and paid for the erection of a tomb-stone; upon the front of which was inscribed "Sacred to the memory of Eleanor Gravenor," &c. and on the back "The family grave of John and Sarah Spooner." The defendant, who was a stone-mason, afterwards, at the desire of Gravenor, took away the tomb-stone, for the purpose of obliterating the inscription on the back, and did in fact obliterate it at his own premises about a week after. This was the injury complained of. The plaintiff had returned from transportation after the time of his sentence had expired.

Wilde, Serjt. for the defendant, contended, that trespass would not lie, inasmuch as there must be a right of exclusive possession to maintain that action; and such right, with respect to things set up in a church-yard, was in the clergyman, and not in the party erecting them. He also contended, that any right of the wife was out of the question, on account of the transportation of the husband.

BEST, C. J. told the jury, that although the freehold of the church-yard was in the clergyman, yet the tomb-stones were the property of those who had erected them; and that as the trespass complained of in that action was not upon

the soil, but upon the tomb-stone, the plaintiff was entitled to recover. He also observed, that during the absence of a husband under a sentence of transportation, the wife was in some respects a *feme sole*, but that on his return the marital rights revived, and all the property which in this case the wife had acquired in respect of the tomb-stone, became vested in him. His Lordship gave *Wilde*, Serjt. leave to move to enter a nonsuit, if the Court should think that trespass would not lie.

1825.
 SPOONER
 v.
 BREWSTER.

Verdict for the plaintiff—Damages 5*l*.

Pell, Serjt. and *Abraham*, for the plaintiff.

Wilde, Serjt. for the defendant.

[Attornies—*Brutton*, and *Donne*.]

In the ensuing Trinity Term, *Wilde*, Serjt. moved, pursuant to the leave given, to enter a nonsuit. He cited Comyn's Digest, tit. Esglise, G. 1; 2 Rolle, 337; *Corben's* case, 12 Co. Rep. 105; Godbolt, 200; Year Book, 9 H. 4, 14 b (a). Comyn's Digest, tit. Action on the Case for a malicious misfeasance, A. 6; and Cro. Jac. 367.

June 7th.

BEST, C. J. mentioned *Daltry v. Dee*, 2 Rolle, 140.

Wilde, Serjt. That case is not law now. By the course of authority it has been overturned. The freehold of the church-yard is in the parson. The case in Cro. Jac. states that a tomb becomes part of the freehold in the church-yard. If the possession is in the parson, then

(a) This is the case of *Lady Wiche*, it is cited in 12 Co. Rep. 105, and in other places, as in 9 Hen. 4, but it is in the year book, 9 Edw. 4, 14 b. That was trespass a-
 gainst the parson, for removing Sir Hugh Wiche's, her husband's, coat armor and pennon from the church. See also Co. Litt. 18 b. and Com. Dig. tit. Cemetery, (C).

1825.
 SPOONER
 v.
 BREWSTER.

no other person can maintain trespass. The declaration is, that the defendant seized, damaged and destroyed, certain tomb-stones, then and there being, and cut and defaced, &c. If that was one continuous act, then at no time did the possession revert to the party.

BEST, C. J.—It appeared from the evidence, that the damage was done a week after the carrying away.

Wilde, Serjt.—But we never left the possession, so that it could not revert to the plaintiff. Suppose the act had been charged to have been feloniously done, if the taking down the tomb-stone was followed immediately by the carrying it away, the owner of the soil never would have possession of it as of a chattel; as if a tree were cut down and immediately carried away, that would not be larceny. Though the heir may have an action, yet it does not appear, that, if there be a removal, the property will revert to him. I apprehend it will continue in the parson. The action on the case is perfectly competent to redress injuries. And holding tomb-stones to be in the possession of the party who sets them up, will deprive the church-yard of much of its protection.

The Court took time to consider, and on the following day, their judgment was delivered.

BEST, C. J. — We have considered the question in this case, and are of opinion, that trespass is the proper form of action. *Buller*, J. says, that for removing a person from a pew, trespass will not lie; but that is because pews are in the disposition of the ordinary, who may put in one person, and then remove him and put in another, for the convenience of the parish, unless there be a faculty. But there is a case in Rolle, which says, that if a pew be broken, trespass is the proper action. This case appears to me to be law: It has been doubted in one case, but is support-

ed by others, and is consistent with common sense. In the case in 9 Edw. 4, 14 b. the form of action turns out to have been trespass. That was Lady *Wiche's* case, which was trespass against the parson, and is cited by Lord Coke. On such a question one case is enough. My brother *Wilde* alluded yesterday to cases of felony, with respect to a tree severed and carried away by one continuous act. I think we ought hardly to allude to criminal cases; because, *in favorem vitæ* decisions are often come to, which do not square well with the principles of the common law. If the contrary had not been settled law, I should have thought such a case a felony, because the moment a tree is cut down, it is a chattel belonging to the party owning the ground; and, when removed *animo furandi*, comes under the same principle, as goods carried from one county into another. It is said, that trespass cannot be maintained, because the possession of the church-yard is in the parson. But the possession of the tomb-stone may be in another. If I grant land reserving to myself the trees; if the tenant cuts them down, trespass will lie.

1825.
 SPOONER
 v.
 BREWSTER.

PARK, J.—There is a case in which Lord Coke expressly says, that the possession of the tomb-stone is not in the parson, because he is paid for the permission to erect it.

GAZELLEE, J.—The case in Godbolt does not affect this case.

Rule refused.

1825.

Adjourned Sittings in London, after Easter Term, 1825.

May 30th.

PETTY and Another v. ANDERSON.

If husband and wife are living together, and business is carried on in the house in which they live, though the wife's name only appears in the purchase of goods, in the parish rates, and in a contract with the parish officers; yet the husband partaking of the profits of the trade, and being aware of and assenting to the dealings, is liable in an action for goods delivered at their house, for the purposes of this trade, though the bills of parcels are headed in the wife's name.

ASSUMPSIT for goods sold. Plea—General issue. The plaintiffs were grocers, and the defendant a baker and confectioner.

The plaintiffs' shopman proved that he had been on the premises where the goods were sent, and had seen the defendant there in a working dress, and applied to him for money; he said, that the witness had better speak to his wife; the wife said, she could not pay him then. The son afterwards brought the money. The name "Anderson" was over the door.

One of the plaintiffs' clerks, proved that he had frequently called for sums due, and seen the defendant come out of the bakehouse with his coat off; who said that he was in the employ of his wife, but received no wages; that although he lived in the house, yet his wife and he did not cohabit; and that they had better not sue him, for if they did, they would not get more than 4s. in the pound.

Another witness proved that he applied for money at the shop, where he saw the defendant's wife, and she said, that she would tell Mr. Anderson.

On the part of the defendant, several bills of parcels were put in: they were in this form—

21 Augt. 1822, *Mrs. Anderson.*

Bought of Petty & Wood.

Witnesses were also called, from whose testimony it appeared that Mrs. Anderson paid rent and rates; and that her name was in the rate books, that flour, and other articles had been furnished on her credit, by various trades-

men, for which she paid, and that she had been employed to serve the parish in which she lived with bread.

It appeared that the defendant had carried on the business of a baker in the same house, till he went to prison; that during his confinement the goods in the house had been sold under a distress for rent, and were purchased by a friend for Mrs. Anderson, who carried on business on the premises, as a baker and confectioner; that after the defendant's discharge under the insolvent act, he came again to the house, and lived there, all the family boarding and lodging together.

For the defendant the case of *Arabella Beard*, 2 Bos. & Puller, 93, was cited (a).

BEST, C. J. told the jury, that, in his opinion, the situation of the husband precluded the application of the law as to feme sole traders; and that although a married woman in London might carry on business for herself, yet, in this case, as the husband lived in the same house with his wife, and partook of the profits of the business, notwithstanding several invoices had been made to her, it must be taken that she was acting as his agent, and that the credit was in point of law given to him. His Lordship observed that the defendant's statement, that, by suing him, the plaintiff would only obtain 4s. in the pound, together with the other circumstances, shewed his recognition of the dealings; and upon this directed the jury to find their verdict for the plaintiffs.

Verdict for the plaintiffs.

In the ensuing Trinity Term, *Wilde*, Serjt. obtained a rule *nisi*, for a new trial, on the ground that the Lord Chief Justice, instead of directing the jury to find their ver-

1825.

PETTY

v.

ANDERSON.

June 6th.

(a) In the case of *Beard & Ux. v. Webb* and another, 2 Bos. & Pul 93, it was held, that a feme covert sole trader in the city of London, was not liable to be sued as such in the courts at Westminster.

1825.
 PETTY
 v.
 ANDERSON.

dict for the plaintiffs, ought to have left it to them to say to whom the credit was given: he cited the case of *Bentley v. Griffin*, 5 Taunt. 356.

June 20th.

The rule came on to be argued in the course of the same term, and *Wilde*, Serjt. was called on to support it. He argued, that, granting it to be a presumption of law that the credit was given to the husband, yet that there were circumstances to be left to the jury, for them to say, whether that presumption was not rebutted; such, for instance, as the payment of rates by the wife, the furnishing of goods by various tradesmen on her credit, and the bills of parcels of the plaintiffs made out in her name. It might be allowed that in cases of millinery furnished to a wife, bills of parcels, by the curtesy of trade, made out to her, furnished very little evidence; but here was the case of a wife notoriously trading on her own account, and supplying a parish with bread. As to the argument of collusion between her and her husband, what injury could there be, if the parties were cognizant of the facts? The wife was supported by friends, and therefore her credit was better than her husband's. He doubted whether, if the goods had been ordered for the husband, they would have been supplied. Were not these facts admissible to shew that the plaintiffs, being cognizant of the circumstances, elected to trust the wife?

PARK, J.—The granting of new trials, of late, has been too much a matter of course. It appears that my Lord C. J. correctly stated the case to the jury, as well as expressed his opinion. In *Cox v. Kitchen*, 1 Bos. & Puller, 338, *Buller*, J. states, that motions for new trials are to depend on the discretion of the Court. Upon full consideration, in my humble judgment, this verdict is so right that no going down again could alter it; and I think, if a new trial were to be granted, and a different verdict returned, it would be the duty of this Court, at least for once, to see if it could stand. L. C. J. *Holt*, in the case of *Langfort v.*

The Administratrix of *Tiler*, Salkeld, 113, ruled that a husband was liable, as a matter of law, for goods furnished to his wife, on the mere ground of their cohabiting together.

1825.
 PETTY
 v.
 ANDERSON.

BURROUGH and GAZELEE, Js. thought the case properly determined.

BEST, C. J.—In Comyn's Digest(a), it is said, that if a wife buy necessary apparel, the assent of the husband is generally presumed. Here it could not be doubted; there was no fact which I could with propriety leave to the jury to repel that presumption. The invoices do not repel it, because the husband saw the goods, and assented to their being sent in, in that way. In the case of *Bentley v. Griffin*, it is true, that the goods were furnished while the parties were living together, and the husband saw the wife wearing the clothes; but the contract was made privately, and the wife told the tradesman not to bring home the goods while her husband was there. In that case, therefore, there was a fact to be left to the jury. But, in the present case, can any thing repel the inference of the husband's assent, when every meal he eats, and the bed he sleeps upon every night, are furnished by the profits of the business?

Rule discharged.

Vaughan, Serjt. and *Chitty*, for the plaintiffs.

Wilde, Serjt. and *Bolland*, for the defendant.

[Attornies—*Amory & C.*, and *Brooking*.]

(a) Title, *Baron and Feme*, (Q).

GIMSON v. WOODFULL.

May 31st.

TROVER for a mare. The mare was shewn to be the property of the plaintiff; but in the course of the examination, If a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, without he has done every thing in his power to bring the thief to justice.

1825.
 GIMSON
 v.
 WOODFULL.

of the plaintiff's witnesses, it came out that the plaintiff had good reason to believe that the mare had been stolen by the person who sold it to the defendant; and that steps had been taken by him, both before a magistrate and otherwise, to get his property back; but that he had done nothing towards bringing the thief to justice.

Onslow, Serjt. for the defendant, contended, that he was under no obligation to go into evidence for the defence. It was clear that the mare had been stolen. What occurred before the magistrate was done to see if restitution could be had, and not for the purpose of proceeding against any supposed offender. This plaintiff had done nothing to bring the thief to justice; and he could not merge the felony in the civil action. And he cited 2 Black. Com. 449; and 4 Black. Com. 362, and the case of *Horwood v. Smith*, 2 T. R. 750.

Vaughan, Serjt.—The cases in Blackstone do not apply; they are merely as to how far property is affected by sale in market overt, and go on to state that, in the case of horses, *inter alia*, the party may have restitution before a magistrate. The property is in us. If a party state facts from which a magistrate may presume a felony, and the magistrate does not go on with the charge, it is enough. I allow that the objection would be good, if an action were brought against the felon himself.

A witness proved that he went with the plaintiff before Mr. Minshull at Bow Street, but as the examination there was taken down in writing, he was not permitted to state what passed.

BEST, C. J. — This is a hard case. I am of opinion that the plaintiff has done nothing that he ought, and I doubt if a statement of facts before a magistrate would be enough. But he goes to get back the property, and not

to prosecute the felon. If I was to hold that this action could be maintained under such circumstances, we should have no more criminal prosecutions. I take it, the law is this: you must do your duty to the public, before you seek a benefit to yourself; and then there is no necessity for a civil action. The decisions go not only to the case of an action against the felon, but as to actions against persons who derive their title under him. There is a case in the Term Reports, which says, that the property is in doubt till after prosecution. I cannot send this case to a jury; there being distinct evidence of felony, I think that the case should have gone to the grand jury. The plaintiff must be called.

1825.
GIMSON
v.
WOODFILL.

Nonsuit.

Vaughan, Serjt. and *Chitty*, for the plaintiff.

Onslow, Serjt. for the defendant.

[Attornies—*Hurst*, and *Watson & Son*.]

At common law, a person robbed could only obtain the restitution of his goods by convicting the thief on an appeal of larceny, a proceeding long out of use, and now wholly abolished by stat. 59 Geo. 3, c. 46: but by the stat. 21 Hen. 8, c. 11, the judges are to grant writs of restitution, if the felon be convicted upon the evidence of the party robbed, or of other by his procurement; but the practice now is, if the stolen property be produced at the trial, for the judge to order it to be given up to the person from whom it was stolen; and my Lord *Hale*, (1 PL 544), lays down, that the *bonâ fide* sale of the goods in market overt, does not operate against the party robbed; and if the thief has converted the stolen property

into money, the Court before whom he is tried, will order that to be delivered up to the person robbed. *Noy*, 128, *Harberrys* case, cited Cro. Eliz. 661; and this is the universal practice. In the case of *Horwood v. Smith*, 2 T. R. 750, the Court held that one who had *bonâ fide* bought goods in market overt of the thief, but had fairly sold them again, before the conviction, was not liable to the owner in trover, though he had notice from the owner not to part with them; but the Court appeared to be of opinion, that trover would have lain against him, if the stolen property had remained in his possession up to the time of the conviction.

But in the case of *Packet v. Patrick*, 5 T. R. 175, it was

1825.
 GIMSON
 v.
 WOODFULL.

held, that the case of restitution of goods did not apply to goods obtained from the owner by false pretences, and without felony. For more on this subject see 2 Curw. Hawk. tit. Appeal, p. 240.

The foregoing, it should be observed, applies to *all* stolen goods when the felon is convicted; but as to stolen horses, it is enacted

by stat. 37 Eliz. c. 12, § 4, that the owner may have restitution of them, if sold in *market overt*, by going through the forms there prescribed, within six months after they are stolen, and on payment to the purchaser of what they cost him, although the felon be not convicted.

COURT OF KING'S BENCH.

Sittings in London, after Trinity Term, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

June 23rd.

DIBDIN v. MORRIS.

A receipt given by the stage manager of a theatre "in satisfaction of all my claims for the last season," does not require the stamp of a receipt in full of all demands.

A receipt for 52*l.* 10*s.* requires only a stamp for that amount, though it mentions 100*l.* paid before.

ASSUMPSIT for work and labour. The services performed by the plaintiff, for which the action was brought, were the writing of a piece called the Laplanders, and the acting as stage-manager of the Haymarket theatre. Evidence was given of the value of the services. For the defence, a receipt signed by the plaintiff was put in; it was for 52*l.* 10*s.*, "being the amount of a benefit at the Haymarket theatre; which sum, together with 100*l.* *already received*, is in satisfaction of all my claims for the last season." This receipt was only on a 1*s.* 6*d.* stamp.

Brougham, for the plaintiff, contended, that the words "in satisfaction of all my claims," made it equivalent to a receipt in full of all demands; and that therefore the stamp was

wrong; or even if that were otherwise, it required at least a receipt stamp for 15*l.* 10*s.*

1825.
DIBBIN
v.
MORRIS.

ABBOTT, C. J.—This is *not* a receipt in full of all demands. It is only a receipt for 52*l.* 10*s.*; and though it mentions the previous receipt of the other sum, it is not at all given as a receipt for that sum.

Verdict for the defendant.

Brougham and *Evans*, for the plaintiff.

Scarlett and *Comyn*, for the defendant.

[Attornies—*Routledge*, and *Brooks & Co.*]



FENTON, Gent. one, &c. v. CORREIA.

June 23rd.

ASSUMPSIT for work and labour by the plaintiff, an attorney, for business done before the commissioners for Spanish claims.

It appeared that the defendant employed the plaintiff to prepare and present memorials, and conduct his business before these commissioners; but the bill for this business was neither signed nor delivered a month before action brought.

A charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver it signed before action brought.

Scarlett, for the defendant, contended, that the plaintiff could not recover, because a signed bill was not delivered a month previously, the plaintiff's claim containing the following taxable items:

l. s. d.

1824. Aug. 18. Attending and searching at the judgment office, to see if satisfaction of judgment was entered, and paid 3*s.* 4*d.*

0 13 4

Sept. 9. Attending again to search whether the

1825
 FENTON
 v.
 CORREIA.

issue was entered in a case of *Madras v. Willes*,
 and could not find it, and paid 1s. 6d. for
 search. 0 10 0
Sept. 9. Attending again to see if the issue was
 docketed in the year 1819, and paid 1s. 6d. 0 6 8
Sept. 13. Attending to search if the issue was dock-
 eted in 1817, or 1818, and paid search 2s. 4d. 0 6 8

Now these being the regular charges of an attorney, they were taxable; for, although they were not for any step taken in a cause, yet they were for the business of an attorney respecting a cause then pending, and for which the plaintiff charges attorney's fees.

ABBOTT, C. J.—As at present advised, I think these are not taxable items, as any one may do this kind of business who is not an attorney: indeed, I have no doubt about it.

Rotch, on the same side, I submit, that the fee paid for such a search is a disbursement at law, which would make the bill taxable as much or more than drawing an affidavit, which any one may do, who is not an attorney.

ABBOTT, C. J.—I think not.

Verdict for the plaintiff.

Gurney and *F. Pollock*, for the plaintiff.

Scarlett and *Rotch*, for the defendant.

[Attornies—*Fenton*, and *Taylor*.]

July 13th

BUCKINGHAM v. MURRAY.

In an action for a libel in a review, it is sufficient to set out the contents of an index, (referring to an article in the body of the review), which is of itself a libel; and no reference need be made to the article itself, if the index contain, *per se*, *prima facie* libellous matter.

ACTION for a libel in the Quarterly Review. There was a count in the declaration setting out that part of the index of the review, which professed to relate to a work

published by the plaintiff, which was as follows: "Buckingham, J. S. Travels in Palestine, 394. Notice of an egregious blunder in the title page of this work, ib. Specimens of his ignorance and book-making, 377, &c. &c."

1825.
BUCKINGHAM
v.
MURRAY.

On the part of the defendant it was objected, that as the index was only a reference to the body of the work, it was not sufficient to state merely the contents of the index, but it was necessary that the count should contain a reference to the whole; otherwise that would appear to be unqualified, which was in fact subject to a material qualification.

ABBOTT, C. J.—Suppose one part is stated which has a qualification, and there be another which has not, have you not a right to read that part which does not contain the qualification? If one part of a book cannot be understood without a reference to another, then you must set out both; but if it is intelligible without, then you need not. Suppose the matter referred to in the index had not been found in the volume. The index may contain a separate libel. I am of opinion there is no ground for the objection.

The defendant afterwards submitted to a verdict for 100*l*.

Scarlett, Brougham, and Hill, for the plaintiff.

The Attorney-General, Gurney, and Park, for the defendant.

[Attornies—*Vizard & B.*, and *Turner & Sons.*]

1825.

July 14th.

GRESLY and Others v. PRICE.

If it be necessary to prove a good petitioning creditor's debt on the 20th May, it is not sufficient to shew that on the 29th of January previous, a sum of 700*l.* was due, and that there were receipts and payments afterwards; but it must be proved that on the specific day as much as 100*l.* was owing.

ASSUMPSIT by the assignees of a bankrupt. To prove that there was a good petitioning creditor's debt on the 20th May, the ledger of the debtor was produced. The witness who produced it did not make the entries in it himself, but stated that he saw several entries in it before the 20th May; but the latest he could speak positively to were of the date of the 29th January; at which time there appeared to be due to the petitioning creditor a sum of 700*l.* On his cross examination he acknowledged that, subsequently to the 29th January, there had been receipts and payments; and he had no means of knowing, except from the books, in what way those receipts and payments altered the state of the account.

Scarlett, upon this, submitted that the plaintiff must be nonsuited, there not being sufficient evidence of the petitioning creditor's debt.

Campbell.—There is evidence to go to the jury, to shew that, on the 20th May, there was due to the petitioning creditor 100*l.*; when on the 29th January so large a sum as 700*l.* was due. It is for the other side to cut down that sum, and reduce it below the sum required.

Scarlett.—The evidence must be legal evidence; the plaintiffs undertake to prove that on a specific day a specific sum was due; and their giving evidence, which shews that it is uncertain whether it was so or not, certainly cannot be sufficient.

ABBOTT, C. J.—I think you have not gone far enough. You must prove a specific sum due on a specific day. After a period of nearly three months, there being continuing

transactions, how is it possible for any one to say, whether 1000*l.* or 5*l.* is due. You are to support your commission, and you have not done it. The plaintiff must be called.

1825.
GUESLY
v.
PRICE.

Nonsuit.

Marryat and Campbell, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Oliverson & Denby*, and *Pearson*.]

Adjourned Sittings in London, after Trinity Term, 1825.

GARDINER *v.* DAVIS.

Oct. 21st.]

ASSUMPSIT for goods sold. The plaintiff was a cow-keeper, the defendant a milkman. The sale and delivery by the plaintiff to the defendant being proved; evidence was adduced on the part of the defendant, to shew, that though the plaintiff ostensibly carried on the business of a cow-keeper, and had his name painted on the carts, his initials branded on the pails, &c. Yet that the business really belonged to a Mrs. Evans.

If one allow another to trade in his own name, and as carrying on the business for himself. A payment to such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade, the person so carrying it on may recover, unless the person for whom it is carried on assert his or her own right to the sum due.

ABBOTT, C. J.—The question here is, more properly, With whom was this present contract made? than, To whom did the business belong? for if a person allow another to trade in his own name, and to hold himself out to the world as carrying on the business, a payment to that other would be a good bar to an action brought by the person for whom the trade was really carried on. And the per-

1825.
 GARDINER
 v.
 DAVIS.

son ostensibly carrying on the trade, is by law entitled to recover for goods sold in the course of that trade, unless the person so suffering him to carry on the trade interfere, by asserting his or her right to the sum due. In this case, it appears that the defendant owes the money either to the plaintiff or to Mrs. Evans, and that the business was carried on by the plaintiff in his own name, and that Mrs. Evans has taken no step whatever to assert any right that she may have to this money; and, therefore, taking it that the plaintiff was carrying on the trade in his own name with her privity and consent, but was really a sort of agent to her, as she has not interfered to assert any claim to this money, he would still be entitled to recover in this action.

Verdict for the plaintiff.—Damages 15*l.* 6*s.*

Brougham and Abraham, for the plaintiff.

Comyn, for the defendant.

[Attornies—*Greenfield*, and *Ledwick*.]

Oct. 21*st.*

CHEMINANT v. THORNTON.

If ten sovereigns are offered to a person, and he is told that he may "take those ten sovereigns in full of his demand," that is not a good tender.

Semble, that a tender must be taken to be made on the behalf of the person who owes the money.

ASSUMPSIT for the wharfage of timber. Pleas—The general issue; and, secondly, a tender of 10*l.* Replication, denying the tender.

The evidence for the plaintiff did not make out the defendant to be the owner of the timber, and therefore did not affect him at all.

For the defendant, in support of the plea of tender, a witness was called, who proved that some persons called on the plaintiff, and tendered him ten sovereigns "for the timber that was on his wharf," and that he might take those ten sovereigns "in full of his demand." The witness stated, that those persons did not mention the name

of the defendant, nor did this witness know the timber to be his.

1825.
CHEMINANT
v.
THORNTON.

Campbell and *Chitty*, for the plaintiff, contended, *first*, that the tender not being shewn to be made on the behalf of the defendant, was not good; that a stranger's going and making a tender would not avail; and *secondly*, that the tender was also bad, as the money was offered in full of the demand.

ABBOTT, C. J.—Perhaps a tender must be taken to be made on the behalf of the person who owes the money; but this tender was not good, being made in full of the demand.

Verdict for the plaintiff on the plea of tender, with 1s. damages.

Campbell and *Chitty*, for the plaintiff.

Marryat and *Comyn*, for the defendant.

[Attornies—*Hutchison*, and *Sherwood & Son*.]

PEACOCK, Gent. one, &c. v. DICKERSON and Another.

Assumpsit for an attorney's bill, Pleas—General issue, and a tender of 3l. 3s. 8d. The proofs of business done, and delivery of a bill, &c. were adduced on the part of the plaintiff.

To prove the tender, a witness was called, who stated, that he saw one of the defendants offer the plaintiff 3l. 3s. 8d. in cash, and that the plaintiff was willing to take it in part; but the defend-

ant said, that she owed him no more, and took up the money again, and would not let the plaintiff take it in part.

ABBOTT, C. J.—This tender is not good. A party tendering money should tender it without making any terms, and should leave it still open to the one party to say that more was due. And to the other, that the sum tendered was sufficient.

Verdict for the defendants on the general issue, and for

other, that the sum tendered was sufficient.

Nov. 3rd.

Tender.—If a person put down a sum of money, and the plaintiff offer to take it in part, and the defendant will not allow him to do so, saying that no more is owing: this is not a good tender; because a person tendering money, should tender it without making any terms, and leaving it open for one party to say that more was due, and to the

1825.
 CHEMINANT
 v.
 THORNTON.

the plaintiff with 1s. damages on the plea of tender.

Scarlett and D. F. Jones, for the plaintiff.

Storks, for the defendant.

[Attornies—*Robinson*, and *Smith & S.*]

This case was tried at the Adjourned Sittings at Westminster, after Trinity Term, 1825: but being on the same subject as the case of *Cheminant v. Thornton*, it was deemed more convenient to insert it in the shape of a note to that case.

Oct. 24th.

BRAIN v. HARDEN and Others.

If trover is brought, and the intended defence is, that the defendant was the consignor of the

goods, and had a right to stop them *in transitu*, and the plaintiff, in anticipation of this, set up that he *bond fide* bought the goods of such consignor before the stoppage *in transitu*.

If it appear that that purchase by the plaintiff was by a written agreement, such agreement must be produced; and if it is not, the plaintiff will not be allowed to give other evidence of his buying the goods.

TROVER for twenty puncheons of brandy. The brandy was in the London Docks, and the London Dock Company finding both these parties claim the brandy, filed a bill of interpleader (a): and this action

(a) On the subject of bills of interpleader, Lord *Redesdale* lays down (*Mitf. Treat. on Equity Plead.* 47) that "where two or more persons claim the same thing by different or separate interests, and another not knowing to which of the claimants he ought of right to render a debt or duty, or to deliver property in his custody, and fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own rights, and their several claims, and pray that they may interplead, so that the Court may adjudge to whom the things belong, and he may be indemnified. If any suits at law are brought against him, he may also pray that the claimants may be restrained from proceeding, till the right is determined. *Prac.*

Reg. 3.—To a bill of interpleader the plaintiff must annex an affidavit, that there is no collusion between him and any of the parties; and if any money is due from him, he must pay it into Court, or at least offer so to do by his bill. The want of the affidavit, that the bill is not exhibited in collusion with any of the parties, is a ground of demurrer to the bill. *Mitf.* 126. The plaintiff, by his bill of interpleader, admits a title against himself in all the defendants. 1 *Ves. & B.* 334. If one of the claimants professes to have a legal and the other an equitable title in the thing in question, it is sufficient to ground a bill of interpleader, and that though the plaintiff has not been actually sued by either, but only the claims made. *Morgan v. Marsack*, 2 *Mer.* 107, and

was therefore brought, under an order of the Court of Chancery. The defendants were the agents of Messrs. Elizé & Co. of Cogniac; of whom Messrs. Matson & Co. of London, had ordered the brandy; but before the brandy had arrived in this country, Messrs. Matson failed, and the defendants directed the London Dock Company not to deliver it; as they, as the agents of Messrs. Elizé, claimed the right of stopping it *in transitu*.

1825.
BRAIN
v.
HARDEN.

In anticipation of this defence, the plaintiff's counsel relied on an alleged *bond fide* sale of the brandy to him by Messrs. Matson, just before their failure. And to substantiate this, they called Mr. Matson, who stated, that their house (which stopped payment on the 21st of February, 1824), sold the brandy to the plaintiff, and received a bill of exchange in payment. In his cross-examination, he said, that there was a written contract for this sale between their house and the plaintiff.

The *Attorney-General* objected, that as there was a written contract for the sale, and for the payment of the price, that written contract must be produced; and if it was not, no other evidence could be given of the sale.

Scarlett, contra.—If this was an action brought on the contract against either of the contracting parties, we must produce the contract; but this being an action of trover against a wrong doer, we need only prove that we bought the brandy, and that it is ours, which we may do without putting in the contract for the purchase of it.

ABBOTT, C. J.—The defendants rely on a right to stop

the cases there cited. At the hearing of a bill of interpleader, the Court will either decide between the defendants, or direct an issue, an action, or a reference to the master, as the nature of the case may require. *Angel v. Hadden*,

16 Ves. 202; and when the right is decided, the court will decree the defendant, who was in the wrong, to pay the costs of the plaintiff, and of the other defendants. *Dorrien and others v. Hardcastle and others*, 2 Cox, 278.

1825.
BRAIN
v.
HARDEN.

in transitu; and, to get rid of that, the plaintiff contends, that he had previously bought the brandy of Messrs. Matson. Now, unless the written contract is put in, you cannot shew a *bond fide* sale of it from them to your client.

The written contract was put in, and the case went to the jury on the question, whether there was a *bond fide* sale of the brandy by Messrs. Matson to the plaintiff, before the stoppage *in transitu* by the defendants.

The jury being of opinion that there was not, found a

Verdict for the defendants.

Scarlett, Denman, and Tindal, for the plaintiff.

The Attorney-General and *F. Pollock*, for the defendants.

[Attornies—*A. Mitchell*, and *Pearce*.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD & LITTLEDALE, JS.
In Bank.

Nov. 7th.

Scarlett moved to set aside the verdict, on the ground that it was against evidence.

The Court were clearly of opinion that the verdict was quite supported by the evidence; but to give the plaintiff an opportunity of bringing the case before another jury upon any better evidence he might be able to produce, their Lordships granted a rule to shew cause why, instead of a verdict for the defendants, a nonsuit should not be entered.

STRONG and Others v. HART and Others.

ASSUMPSIT for freight. The plaintiffs were the owners of the brig Atlantic, and the defendants were Messrs. Hart & Co., and Messrs. Hunter & Co.; each of which firms carried on business at St. John's, Newfoundland.

In the month of April, 1821, Messrs. Hart & Co., and Messrs. Hunter & Co., shipped cod-fish on board the Atlantic: 1800 quintals belonging to Messrs. Hart & Co., and 1400 to Messrs. Hunter & Co.; for which the captain (who was one of the plaintiffs) signed separate bills of lading. All the fish was consigned to Messrs. Page & Noble, of Oporto. On the 28th of April, the captain received the following letter, signed by one of the firm of Hart & Co., and one of the firm of Hunter & Co.

“ St. John, Newfoundland, 28th April, 1821.

“ Captain James Allen, Brig Atlantic.

“ Sir,—Having *jointly* laden your brig with a cargo of merchantable cod-fish, we request you will embrace the first favourable wind that offers, and proceed directly for Oporto; and on your arrival off that bar, we beg you will endeavour to communicate with our friends Messrs. Page & Noble, to whom your cargo is consigned, *and whose instructions you are to follow* as to your further proceedings with our fish. Should you discharge at Oporto, which we think very probable, our friends there will pay your freight according to bills of lading; and if ordered to a second port, the customary advance of 3*d.* *per* quintal will be allowed. We entreat your best exertions, &c., and remain, &c.

Hart, Robinson & Co.
Hunter & Co.”

The brig sailed and arrived at Oporto, and the captain was told by Page & Noble to go on to Bilboa, and place his cargo

1825.

Oct. 24th.

If in a case where (there being no charter-party), the captain of a ship deliver the cargo, and, as the best thing he can do for all parties under the existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs for the amount of the freight: This does not discharge the owners of the cargo, but they are liable for freight if the bill be dishonoured. But if it appear that he might have had his money of the agent, and chose to take the bill, it is otherwise.

1825.
 {
 STRONG
 v.
 HUNT.

in the hands of Messrs. Acha, Basozabal & Co. The captain accordingly did so, and delivered his cargo to them on the 14th of June; they at his request paid for him a part of the port charges, &c. and paid him a small sum in cash, and gave him a bill of exchange for 464*l.* 6*s.* 3*d.* the residue of the freight. This bill was drawn at 90 days after date on a person named Ugarte, who resided in London. This bill was dishonoured, and Messrs. Acha & Co. stopped payment in the month of August.

Scarlett, for the defendants Hunter & Co., contended, that Messrs. Hunter & Co. and Messrs Hart & Co. could not be jointly liable in this action, because each shipped a separate quantity of their own fish, and it was not a joint shipment by both. And even if it was so, the captain has a lien on the cargo for his freight, and he may refuse to deliver it, till his freight is paid. The defendants shipped their goods to Messrs. Page & Noble, knowing nothing of the house of Acha, Basozabal & Co. to whom the ship was sent by Page & Noble. When the ship arrived at Bilboa, the captain might have had his freight in specie. He is one of the plaintiffs, and he preferred making Messrs. Acha, Basozabal & Co. his agents, for he employed them to pay the port charges; and for the residue of the freight, he, for his own convenience, took a bill, when he might have had cash: now he cannot say that he will take a bill for his own convenience, and yet hold others liable. To entitle the plaintiffs to recover, it ought to have been proved, that Acha, Basozabal & Co. got possession of the cargo by fraud, and that then the only thing the captain could do was to get this bill. By the bills of lading, which constitute the contract, the goods were to be delivered to Page & Noble, or their assigns, they paying freight. Why did not the captain make them do so? The question is this—Was this bill of exchange forced on the captain, or did he take it for his own convenience? for if he chose to take a bill of persons who were no parties to the contract,

he does so at his own risk, and we are not answerable for it.

1825.
STRONG
v.
HUNT.

Marryat, for Hart & Co. waived all objections to the form of the action, and stated that there was no case to be found like the present, where there was not a charter-party.

ABBOTT, C. J.—As to the first point, that this was not a joint contract by these two firms. If the case had depended on the bills of lading, it might not have been so; but then the ship would not have gone farther than Oporto; but the letter of the 28th of April, goes to make all the defendants partners in this transaction, as both the houses Hart & Co. and Hunter & Co. jointly direct the captain to follow the instructions of Page & Noble. As to the other point, the master *may* retain the goods, till he is paid his freight, but the custom is to deliver the goods and then to be paid the freight. The strong presumption in this case is, that the captain delivered the cargo, and finding that he could not get his money, he took a bill as the best thing he could do for all parties. If it had appeared that he might have had his money, but chose to have a bill, that would be a defence; but that is certainly not made out. If this was a joint contract, and if the captain took this bill as the best thing he could do under the circumstances, the plaintiffs are entitled to recover.

Verdict for the plaintiffs—Damages, 464*l.* 16*s.*

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JS.
In Bank.

Scarlett, on the behalf of Messrs. Hunter & Co., applied for a new trial, on payment of costs: he moved entirely on affidavits, shewing that Messrs. Hart & Co. and Messrs.

1825.
 {
 STRONG
 v.
 HART.

Hunter & Co. had not jointly shipped the cargo. The Court granted a rule to shew cause.

The *Attorney General, Peake*, Serjt. and *Campbell*, for the plaintiffs.

Scarlett and *Brodrick*, for the defendants, Hunter & Co.
Marryat and *F. Pollock* for the defendants, Hart & Co.

[Attornies—*Holme, F. & L.* for the plaintiffs; *Macdougall & Co.* for Hunter & Co.; and *R. S. Wadeson*, for Hart & Co.]

In the case of *Tapley v. Martens*, 8 T. R. 451, which was an action on a charter party, it was held that the captain taking for his freight a bill of the consignee of the cargo, who was the consignor's agent, and which was dishonoured, did not take away his right of action for the freight against the defendant, who shipped the goods: but Lord *Kenyon* said, that if the consignee had been ready to pay in money, and the plaintiff had taken the bill for his own accommodation, there might have been some weight in the arguments used for the defence. The case of *Christy v. Row*, 1 Taunt. 300, was also an action on a charter party: it was there held, that if the captain sign a bill of lading, and it is stated, that the freight is to be paid by the consignees on the delivery of the cargo, he does not by that give up his claim on the consignor for the freight. And in *Shepard v. De Bernales*, 13 Ea. 565, on that point Lord *Ellenborough* says,

that if the clause in the bill of lading, that the consignee should pay the freight, were introduced with a view to the consignor's security, and made it incumbent on the master of the ship, at his peril, to look to the consignee under the bill of lading for payment of the freight; the plaintiff had no right to deliver to the defendant's agent without first receiving such payment, and his delivery without payment was in that case not a right and true delivery; but if this clause were introduced for the master's benefit only, and merely to give him the option, if he thought fit, to insist upon his receiving freight abroad before he should make delivery of the goods, he had a right to waive the benefit of that provision in his favour, and to deliver without first receiving payment; and he is not precluded by such delivery from afterwards maintaining an action. And the latter seems the true construction of this contract.

1825.

ROBINSON, Clerk, v. WARD, Gent. one &c.

October, 25.

ASSUMPSIT. The declaration contained a special count, which stated, that in consideration that the plaintiff would retain the defendant as his attorney, &c. he would use due care, diligence, &c.; and proceeded to state that not regarding, &c. he did not place a sum of 5200*l.* in the funds, as was his duty, whereby the same was lost. There were also the common money counts. Plea—General issue.

The case was tried almost entirely on admissions: and on the part of the plaintiff the following facts appeared—The plaintiff had sold an estate in Hampshire to Mr. Alexander Baring; for which the defendant, as the then solicitor for the plaintiff, had received 5300*l.* on the 21st of August, 1824; and out of this sum the defendant was to pay certain charges incidental to the sale of the estate; and to place the residue in the funds. The amount of the charges to be paid by the defendant out of this sum of money was not ascertained till the 10th of September, though, as early as the 28th of August, they were known not to exceed 100*l.* The defendant had previously to the 10th of September paid the identical notes he received, as the purchase money of this estate, to the credit of his private account, at his banker's, Messrs. Marsh & Co. of Berners Street. The 10th of September was on a Friday. The bank of Messrs. Marsh & Co. paid during the whole of Saturday the 11th, but never paid after that. It was also proved that Messrs. Hoare & Co. were the plaintiff's bankers, and that the defendant knew this.

For the defendant it appeared, that he had for some time kept this money in his own house; but that, being unwell, he went out of London, leaving only two female servants in his house; and that previous to his departure from London, he paid this sum of money into the hands of his bankers; with whom he had, at the time of

If an attorney has the money of a client in his hands, and pays such money to the credit of his own private account at his banker's, and that banker fail, he will be liable for the amount to the client, although he does so *bond fide*, and have a large sum of money of his own at that banker's.

His proper mode would be to open a new account with a banker, and to pay it in, in his own name, but 'to the credit of A. B.'s 'estate.'

1825.
 ROBINSON
 v.
 WARD.

their failure, a further sum of about 1800*l.* of his own money. It was proved that Saturday is not a transfer day at the Bank; but that stock may be transferred on that day, on payment of half a crown extra.

Scarlett, for the defendant, argued, that the defendant was not bound to take more care of this money, than of his own. If he had locked up the money in his chambers, together with his own, and it had been stolen, the defendant clearly would not have been answerable; now, instead of this, he placed it at a banker's, which was considered a much safer place for large sums of money. If the defendant had kept the money for his own purposes, the case would have been different; but he lost his own money in the same way, and he cannot be more answerable in this case, than if he had locked it up in his own chambers: and the reason why the defendant did not pay the money into the hands of Messrs. Hoare, to the credit of the plaintiff's account, was, that he could not then have drawn it out, to invest it in the funds without the delay of obtaining a check for that purpose, from the plaintiff, who was in the country. And he cited *Knight v. Earl of Plymouth*, 3 Atk. 480, and *Rowth v. Howell*, 3 Ves. 565.

ABBOTT, C. J. (stopping the *Attorney-General* in reply). There are three modes which a person may adopt, when the money of others is placed in his hands. The first is, for him to keep it in his own house; what the consequences of that mode are, it is unnecessary for me at present to state. Another mode is, for the party to pay it into his banker's, on his general account; but the third, and the correct mode is, for the party to open a new account in his own name for this particular purpose. The defendant should have paid this money into a banker's hands, by opening a new account in his own name, "for the credit of Robinson's estate," and so to ear-mark the money, as belonging to that estate: then it would have been kept separate. But if the

person having the money mixes it with his own, he thereby makes himself personally debtor to the estate. Here the defendant has mixed this money with his own, by paying it to the credit of his private account at his banker's; and he is therefore liable in this action. This is a very hard case, and all suspicion against the defendant is quite out of the question; but one of two innocent parties must lose the money, and, under the circumstances of this case, I think, that the plaintiff is entitled to a verdict.

1825.
 ROBINSON
 v.
 WARD.

Verdict for the plaintiff. Damages, 5136*l.* 6*s.* 8*d.*

The *Attorney-General*, *Bolland*, and *Law*, for the plaintiff.

Scarlett and *Comyn*, for the defendant.

[Attornies—*Parther*, and *Turner & Ward*.]

In the case of *Knight v. Lord Plymouth*, 2 Atk. 480, a receiver under the Court of Chancery, having a large sum to remit to London, for safety paid it to a tradesman, and took his bills on London for the amount; the tradesman failed. Lord *Hardwicke* considered the getting these bills to remit, to be a measure of necessary precaution; and held the receiver not answerable; but

said, that if he had placed the money in what he knew to be improper hands, he should consider him answerable.

Rowth v. Howell, 3 Ves. 565, was the case of an executor, who paid securities for money into the hands of the person who had been the banker of his testator, whereby they were lost; and the executor was held not answerable.

1825.

Adjourned Sitzings at Westminster, after Trinity Term, 1825.

BEFORE LORD CHIEF JUSTICE ABBOTT.

October 28th.

DEAN v. BROWN, Esq. and Others.

If a feme sole is carrying on a trade, and before her marriage, conveys her 'stock in trade, 'furniture and 'other articles, 'belonging to 'her, in and 'about her said 'business," to a trustee, for her separate use, and then marries; such property is not liable to be taken in execution for the debts of her husband, though some of the articles have been disposed of, and others purchased for her use in their stead.

TROVER for a horse and chaise. The defendants were the sheriff of Middlesex, and one of his officers. The sheriff had taken the horse and chaise under a writ of *fiery facias* which had issued against the goods of a person named Hall.

For the plaintiff it appeared, that Hall had married Miss Tyler, who was an artificial florist; and that previous to their marriage a deed of settlement, dated the 24th of January, 1824, was executed between Hall, Miss Tyler and the plaintiff, (together with another person since deceased); by this settlement, after reciting that a marriage was about to be had between Hall and Miss Tyler, and that she had carried on the business of a plumassiere and artificial florist, and had stock in trade and other property, it was agreed, with the consent of the intended husband, that the plaintiff (and the deceased trustee) should hold to and for the sole and separate use of Miss Tyler, after her intended marriage, "all her household furniture and other effects" specified in a schedule, (in which schedule neither the horse nor chaise were inserted) "and all her stock in trade, materials and other articles now belonging to her in and about her said business."

Miss Tyler married Hall, and still continues to carry on the business of an artificial florist; she had the horse in question before her marriage, and also a chaise, which was sold subsequent to the marriage, and the chaise in question bought in its stead; which latter was used as the former had been, about her business, she being very lame.

Notice was given by the plaintiff to the sheriff that the horse and chaise belonged to him under the settlement, the terms of which were briefly stated in the notice.

The defendants relied on the circumstance of the horse and chaise not being included by name in the schedule to the settlement, and on the fact of Hall having used the chaise when his wife was not with him, and of his having had the horse to draw a cart employed by him in his business as a corn-chandler.

ABBOTT, C. J.—The question in this case is, not whether this horse and chaise are the property of Hall or of his wife; because, by the law of this country, a married woman can have no property distinct from her husband, and by her marriage all property that she had before belongs to him, and is liable to his debts, but in another mode the property of even moveable articles may be secured to a wife, by her, previously to her marriage, conveying such property to trustees, for them to hold it to her sole and separate use. In this way, though a wife herself can by law have no separate property, yet the trustees may hold it for her, so that it shall not be subject to the control of her husband, nor liable to his debts. With regard to real estates this was done many, very many years ago, and in more modern times personal property has often been so secured. The question here is, whether this property is by the settlement vested in the plaintiff: by the settlement all her furniture and effects mentioned in the schedule are conveyed to him. These words are large enough to have passed the property in the horse and chaise to the plaintiff, if they had been named in the schedule, but they are not, and therefore, as far as that part of the settlement goes, the property in them would pass to the husband on the marriage; but the parties by the settlement proceed to convey to the plaintiff all the stock in trade, materials, and articles belonging to her in and about her said business. The question therefore is, whether this horse and chaise

1825.
DEAN
v.
BROWN.

1825.
 DEAN
 v.
 BROWN.

were necessary to her in and about her business. She, it appears, was lame, and that would make it convenient to her to use a chaise; but indeed a chaise might be useful to a physician or a lawyer, without being necessary for either. It is pretty clear, that the horse was hers, and that she bought the chaise; and if they are articles necessary to her in and about her trade, the property in them is by the settlement vested in the plaintiff, as her trustee; but if they are not, they become the property of the husband on the marriage.

The jury thought them necessary; and found a verdict for the plaintiff.

His Lordship gave the defendants' counsel leave to move to enter a nonsuit, if the Court should be of opinion that there was no case to go to the jury, on the ground that these articles could not be included under the words of the settlement.

Scarlett and Comyn, for the plaintiff.

Gurney and Holt, for the defendants.

[Attornies—*Grimaldi & S.*, and *Smith & B.*]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITTLEDALE, JS.
 In Bank.

Gurney moved for leave to enter a nonsuit, or for a new trial, on the ground that the horse and chaise could not be included within the terms of the deed, for that they were not necessary to the trade of Miss Tyler; or that, if they could be taken to be within the terms of the deed, the verdict was against evidence.

ABBOTT, C. J.—It occurred to me at the trial, that the

question whether the horse and chaise were within the words of the deed, was a point of law, but as the case was not put on that, I left it to the jury, but reserved the point, as the Court might consider it a mere question of construction of a deed.

1825.
DEAN
v.
BROWN.

The Court granted a rule to shew cause.

See the cases of *Cadogan v. Ken-* *ston*, 3 T. R. 618. *Haslinton v. Gill*,
nett, Cowp. 432. *Jarman v. Wool-* 3 T. R. 620, n.



MARTINEAU and Another v. WOODLAND.

October 29th.

ASSUMPSIT for not accounting for the price of certain bombazeens and crapes sold by the defendant for the plaintiffs, on commission.

The plaintiffs were manufacturers of crape at Norwich, and the defendant (and his partner who had been outlawed) carried on business at Calcutta. The goods had been sent to them to sell on commission, and they had sold them.

To prove this, the defendant's agent in London was called: he stated that he had accepted a bill for the sum for which the action was brought, which bill had been dishonoured, and was in the hands of the plaintiffs.

If goods were sold on commission by the defendant abroad, on an action for not accounting, the defendant's agent in London is a competent witness for the plaintiff, though he has accepted a bill for the price of them, which is lying dishonoured in the hands of the plaintiff.

Marryat objected that he was not a competent witness, as, having accepted a bill for the sum in question, it was his interest to fix the defendant in this action; for if he paid the plaintiffs, the witness would be exonerated on the bill.

Scarlett contra.—He is indifferent, his interest being equal each way, for if he is obliged to pay the bill, he will recover the amount of the defendant, and if he makes the

1825.
 MARTINEAU
 v.
 WOODLAND.

defendant pay in this action, the witness does not pay any thing.

ABBOTT, C. J.—I think he is a competent witness.

Verdict for the plaintiff.

Scarlett, and Jardine, for the plaintiffs.

Marryatt, for the defendant.

[Attornies—*Martineau & M., and Kearsey & S.*]

Nos. 3d.

PRINCE and Another *v.* LEWIS.

The owner of a market can maintain no action against a person selling in the street near his market, if he allows the area of his market to be partly used for purposes unconnected with the market, although there may be sufficient room left in the market, especially if no notice was given to the defendant that there was room for him to sell in the market.

ACTION on the case. The declaration stated that the plaintiffs were possessed of a certain close, called Covent Garden Market, situate &c. and to a certain market holden and to be holden there on every day in the week throughout the year, Sundays and the feast-day of the birth of our Lord Christ excepted; for the buying and selling of all and all manner of fruit, flowers, vegetables, roots and herbs whatsoever, together with the toll, stallage, &c. to such market appertaining; whereby divers great gains, &c. accrued and ought still of right to accrue to the plaintiffs; yet the defendant, well knowing, &c. and fraudulently intending, &c., on the 4th day of January, 1825, and on divers other days, &c. being all other days than a Sunday, or Sundays, or the feast-day &c. and being respectively days on which the said market was held at &c., in a certain public highway there near to the said market, and within 72 yards of the said market, wrongfully &c. and without the licence of the plaintiffs, and against the will of the plaintiffs, exposed to public sale, and sold to divers persons divers large quantities of vegetables, &c. and the said persons who so bought the said vegetables, &c. and who would have otherwise resorted to the said market, were induced to resort to the

said highway, and there buy these vegetables, &c. so exposed to sale in the said highway, to the damage of the plaintiffs, and to the injury of the said market, by means of which, &c. the plaintiffs were disturbed and annoyed in the exercise, &c. of the said market, and were deprived &c. of divers large sums, &c. which would have accrued, &c. Plea—General issue.

1825.

 PRINCE
 v.
 LEWIS.

It appeared that the plaintiffs were the lessees of Covent Garden Market, under the Duke of Bedford. The market was granted to William Duke of Bedford, in the reign of King Charles the Second, by letters patent, for the buying and selling "of all and all kinds of fruits, flowers, roots and herbs whatsoever, together with all liberties, free customs, tolls, stallage, piccage, and all other profits, advantages and emoluments whatsoever to the like market in any wise belonging or appertaining." This grant was recited in a private act of parliament, 53 Geo. 3, c. 71, entitled an act for regulating Covent Garden Market, and this act made the accustomed toll payable by the seller of fruit, &c. in this market; and it was proved that the defendant, who occupied a house in James Street, on the 4th of January, 1825, placed a waggon before his door, and within about 70 yards of the market, and there sold greens: he was asked for the toll, but refused to pay it. It was proved that there was at this time sufficient room left in the market for him to have gone there, if he had chosen; but upon the cross examination of the plaintiffs' toll collector, it appeared that, in the area of the market, there were several persons who rented stands by the year, and also three shops for the sale of china, and also some other buildings. It did not appear, that the defendant was requested to go into the market, or that he was told there was sufficient room there.

ABBOTT, C. J. on this evidence ruled, that the owner of a market could bring no action against those who sell near it, unless such owner devotes the whole of his market to

1825.
 PRINCE
 v.
 LEWIS.

the purposes for which it was granted, and that the plaintiffs having allowed shops to be in the area of this market, were not entitled to recover. His Lordship therefore directed a

Nonsuit.

Gurney, and *Hutchinson*, for the plaintiff.

Scarlett, *Marryat*, and *Comyn*, for the defendant.

[Attornies—*Phillips*, and *Rogers & Son*.]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITTLEDALE, JS.
 In Bank.

Nov. 9th.

Gurney moved for a new trial in this case, and argued that the owner of a market did not lose his remedy against persons selling articles near it, by the mere fact of there being buildings in it, provided that sufficient room were left in the market; if the market were full, it would be otherwise; but if a person could have access to a market, and could have a stall there, he was not at liberty to sell on the outside.

BAYLEY, J.—Had the defendant notice that there was room in the market?

ABBOTT, C. J.—He had not, and that circumstance had great weight in my mind.

BAYLEY, J.—This is a vegetable market, and my doubt is, whether the public have not a right to the whole of it for that purpose.

Gurney.—The defendant was bound to go to the market as long as there was room.

ABBOTT, C. J.—In that I quite agree with you, provided that your market were entirely open.

Gurney.—The defendant must have known that there was room; and besides, he never asked for a stall nor complained that the market was occupied in an improper way.

1825.
PRINCE
v.
LEWIS.

The Court granted a rule to shew cause.

In the case of *Blakey v. Dinsdale*, Cowp. 664, Lord Mansfield lays down, that if corn is bought and sold just outside the market, in fraud of the toll, the owner of the market cannot distrain for toll, but must bring an action on the case. And in the case of *Mosely v. Pierson*, 4 T. R. 104, and *The Bailiffs, &c. of Tewkesbury v. Bricknell*, 2 Taunt. 120, it was held that if parties did not bring their goods into

the market, but sold them by sample, an action on the case would lie against them for such injury to the market. And in the recent case of *Wells v. Miles*, 4 B. & A. 559, it was laid down, in confirmation of former authorities, that toll could only be taken in respect of things actually brought into the market, and there sold. In this last case, the law was very fully gone into by the counsel and the Court.

DREW and Others, Gent., three &c. v. CLIFFORD.

Nov. 3rd.

ASSUMPSIT for an attorney's bill. Plea—General issue. A bill, signed by the plaintiffs, had been duly delivered; it was for business done in the Insolvent Debtors' Court and on a writ of error, (as to these there was no dispute), and also in an action at the suit of the defendant, against a person named Austin, in which the defendant had recovered against Austin, and the costs had been taxed as between party and party, at 5*l.* 13*s.* but those costs could not be obtained of Austin. In the bill delivered in the present case, this was charged in the following terms,—

In an attorney's bill, it is not sufficient to charge the costs of an action brought for the now defendant by the plaintiffs as attorneys, at one sum in the lump, although the costs in that action had been taxed at that sum as between party and party.

Austin v. Clifford.

“ An action having been brought, and judgment obtained, the costs of the action were taxed at 5*l.* 13*s.*”

The taxation between party and party by the master was proved.

1825.
DREW
v.
CLIFFORD.

Lawes, for the defendant, objected, that as it was not stated in the bill delivered, what was done by the plaintiffs as attornies, to this amount, in that action, they were not entitled to recover for it.

Richards, for the plaintiffs, argued, that as this was the amount allowed by the master, as between party and party, the bill in its present form was quite sufficient; and as the only use of ever stating items in an attorney's bill, was for the purpose of having it taxed, that was in this case rendered unnecessary.

ABBOTT, C. J.—I shall hold that the plaintiffs cannot recover this sum of 51*l.* 13*s.* A bill must be delivered with items, if for no other purpose, at least to shew that the party is not charged for the same thing twice over. I think this bill charging a sum in the lump is not sufficient, but as to the other business done the plaintiffs are entitled to recover for it.

Verdict for the plaintiffs—Damages 33*l.*

Richards for the plaintiffs.

Lawes, for the defendant.

[Attornies—*Drew & Co.* and *Ingold*.]

COURT OF COMMON PLEAS.

Sittings in London, in Trinity Term, 1825.

BEFORE LORD CHIEF JUSTICE BEST.

WATT v. COLLINS.

June 10th.

ASSUMPSIT on an attorney's bill. The bill contained charges for the following items:

"Writing long letter relative to your defence, in the actions commenced against you by *Pigeon* and *Benson*."

"Attending Mr. Tricker, when he proposed to take a cognovit."

"Writing letter upon the subject of your procuring bail, and attending you thereon."

"You wishing to have Tricker served with a copy of a writ; attending you, stating that as you were in custody, it would be dangerous to commence proceedings; with which you appeared satisfied."

"You wishing to know what I had done with Tricker's actions, attending you, advising you to settle them, you having no defence."

In an action on an attorney's bill, it is sufficient, to bring the bill within the stat. 2 G. 2, c. 23, that some of the items upon the face of them, are of such a nature as to shew that a cause must have been depending in some court; and it is not necessary to prove *aliunde*, that there was a cause depending.

Vaughan, Serjt. went for a nonsuit, on the ground that the bill contained taxable items, the terms of the stat. 2 Geo. 2, c. 23, not having been complied with.

Wilde, Serjt. and *Platt*, for the plaintiff, contended, that the bill did not contain taxable items. If an attorney's attending to talk to his client, and his writing to him, are taxable, there is hardly any thing that is not so. What is required is a proceeding in Court. This was

1825.
 WATT
 v.
 COLLINS.

held in all the cases. They cited *Mowbray v. Fleming*, 11 East, 285 (a), and *Fenton v. Correia, ante*, p. 45.

BEST, C. J.—Asked the defendant's counsel, whether they were in a condition to prove the fact of there being actions in which these things charged for were done?

The defendant's counsel replied in the negative; and contended, that it could not be doubted, from the nature of the charges, that there were suits depending. Preparing an affidavit had been held to be a common law charge. It is not necessary that a process should be issued, but only that the attorney should be engaged. One of the items is about a cognovit, and there must be a cause depending before a cognovit. And attending a man, advising him respecting discontinuing proceedings, is a taxable item.

BEST, C. J.—I have paid all the attention I can to this case, and am of opinion, that some of the items are taxable. It must appear that there were some proceedings in a cause; for, unless there was business done in a Court, the bill is not subject to taxation. But it is not necessary that the proceedings should be produced to shew this. There is a case in the 6 T. R. (b), in which it was held,

(a) In the case of *Mowbray v. Fleming*, the item considered by some of the judges not to be taxable, was the following, "To attending with you, both by myself and clerk, on Mr. Towse in the City, respecting a suit at law commenced against your brother Richard Fleming; when, after consulting counsel, and after several other attendances and letters, the business was adjusted to your satisfaction." But that case was decided on another point, namely, that if

an attorney having delivered no bill, deliver a particular under a judge's order, containing some taxable matters, and some not, he may recover for those which were not taxable. But in the case of *Hill v. Humphries*, 2 Bos. & Pul. 343, it was decided, that if an attorney delivers a bill, in which there is one taxable item, the whole bill is taxable.

(b) *Winter and Another v. Payne*, 6 T. R. 645.

that items for drawing an affidavit of debt, attending the party to get it sworn, and for the fee paid for the oath, made the bill a taxable bill, as those were for proceedings in Court. And in *Mowbray v. Fleming*, the item was held not to be taxable, because the communications with the plaintiff were about the defendant's brother; and it did not there distinctly appear that the plaintiff was the attorney in the cause, and the defendant might have gone to see how far he could become security for his brother. The question is, if, looking at this bill, I can see that business was done in some case. It seems, that the defendant wanted bail. This he would not have required, if no action had been brought; and the last item, of advising the discontinuance of some actions, shews that there was some cause. And there are items for assistance given in the course of causes, which I must take to have existed at the time. It is for the benefit of attornies and the public, that attornies' bills should be taxed. I am therefore of opinion that on this the plaintiff ought to be called.

1825.
 WATT
 v.
 COLLINS.

But it appearing that there was a claim for rent, on which the plaintiff was entitled to a verdict, the whole matter was afterwards referred to the Prothonotary.

Wilde, Serjt. and *Platt*, for the plaintiff.

Vaughan, Serjt. and *Comyn*, for the defendant.

[Attornies—*Watt*, and *Scott & Son*.]

1825.

Sittings at Westminster, after Trinity Term, 1825.

June, 23rd.

BEST, Esq. v. OSBORN.

If a general warranty of a horse be proved by parol, (the written contract for the sale not being forthcoming), the fact that the witnesses who proved it, saw a notice board on the seller's premises, requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the jury, for them to say whether this formed any part of the original contract.

If the owner of a horse, sold by a stable-keeper with a warranty, go to the buyer and request to have the horse back, stating that he did not authorise the warranty of soundness, and the buyer refuse to give it up, saying, I know nothing of you, I bought the horse of Mr. O. such refusal is not a waiver of the warranty.

ACTION on the warranty of a horse. On the part of the plaintiff, proof was given of a general warranty of soundness by the defendant, who was a stable keeper; and sold the horse in question, on the behalf of a Mr. Tawney. The defendant's son had got back from the plaintiff a written contract given on the sale, which contained a warranty, by fraudulently representing that he had the plaintiff's authority to require it^(a). It was therefore not produced. But the witnesses who proved the warranty, admitted that they saw a board on the defendant's premises, which contained a notice, that horses warranted sound, not returned within six days, would not be taken in. The horse was unsound, because it had had a nerve divided. It was not returned within the six days.

The owner of the horse, Mr. Tawney (who, it appeared, had not authorized the warranty by the defendant), applied to the plaintiff, and told him he would take the horse back; but the plaintiff not being at that time aware of the horse's defects, did not consent, but said, "I know nothing of you, Sir; I bought the horse of Mr. Osborn."

For the defendant, it was contended, that the plaintiff could not recover. *1st*, on account of the notice contained on the board, which was a qualification of the warranty, the plaintiff not having complied with its terms; and *2nd*, because he had waived the warranty, by consenting to retain the horse, when the owner requested that he might be delivered up to him. The case of *Buchanan v. Parnshaw*, 2 T. R. 745 ^(b), was cited on the first point.

(a) See *ante*, Vol. 1, p. 632.

sold at a public auction, warranted sound, and six years old; one

(b) In that case the horse was

BEST, C. J.—There are two questions in this case, besides that of the soundness of the horse: *First*, Whether there was a warranty? *Secondly*, Whether that warranty has been got rid of? The declaration is on a general warranty, making no mention of the condition to return within six days. And it is for the jury to say, whether the board which the plaintiff's witnesses saw, formed any part of the original contract; for if it did not, it will not avail the defendant. It appears that the written contract was got back by means of fraud. If there were any other evidence of the contract than that which the plaintiff has given, it would have been easy for the defendant to have produced it. In the absence of such evidence, unless the jury shall think that the contents of the board formed a part of the contract, the warranty in the declaration is made out. The case in the 2 T. R. is different from this; that was the case of a sale by auction, and any man who buys at an auction, knows that he is buying subject to conditions of sale. But in this case there is a special contract between these parties complete in itself. With respect to the second question, has the warranty been dispensed with? In point of law, it cannot be rescinded without the consent of the plaintiff, and it is in evidence that he did not consent to waive the warranty; he merely said to Mr. Tawney, I know nothing of you, I bought of Osborn.

1825.
BEST
v.
OSBORN.

Verdict for the plaintiff.

Wilde, Serjt. and *Dwarris*, for the plaintiff.

Vaughan, Serjt. and *Platt*, for the defendant.

[Attornies—*Bevan*, and *Taylor*.]

of the conditions of sale at the auction was, that horses sold there should be deemed sound, unless returned within two days. The horse in question was returned ten days after, on the ground that he was twelve years old, instead of six. The Court held that this condition

of sale, applied only to warranties of soundness, and not to those of horse's age. And Lord *Kenyon* observed, that there was good sense in making such conditions at public sales, as to the one, which did not apply as to the other.

1825.

June 23rd.

NEWBORN v. JUST.

A keeper of a booking house cannot set up a notice, that he will not be answerable for goods, if above a certain value, as a defence against the effect of negligence in himself or his servants.

THE declaration stated that the defendant kept a house called the Spotted Dog, for the purpose of receiving trunks, &c. to be conveyed by carriers to various places, &c. and that on the 26th March, the plaintiff delivered a trunk, containing wearing apparel, to be delivered for his son at an academy, at Sidcup, in Kent; and that the defendant failed in his duty to deliver, and so negligently conducted himself, that the trunk was eventually lost.

Two witnesses for the plaintiff proved the delivery of the trunk, and the payment of two-pence for the booking.

A person residing at the academy at Sidcup, proved, that although the carrier delivered some parcels at the house, on the day in question, the trunk was not of the number.

BEST, C. J. — Do not you prove that the defendant did not put it into the cart. You must call the carrier. The jury cannot at present presume that the defendant did not do his duty.

The carrier was then called, and stated that on the day in question, no trunk for Sidcup had been delivered to him. He added, that there was a notice at the house, in the usual form, stating that the defendant would not be answerable for goods above the value of 5*l.* unless specially paid for. This notice he said was to protect the house as well as the carrier.

The trunk in question, was admitted to be, with its contents, of greater value than 5*l.*

Wilde, Serjt. for the defendant, relied on the effect of the notice.

BEST, C. J. — I don't think the notice will assist you;

you are not in the situation of a carrier. You are not an insurer. This notice is to protect from insurance. But it has been decided over and over again that notice does not protect a carrier against negligence, and your client can only be liable for negligence.

1825.
NEWBORN
JUR.

Vaughan, Serjt. and *Holt*, for the plaintiff, cited the case of *Batson v. Donovan*, 4 B. & A. 21.

Wilde, Serjt.—My client not being bound to receive parcels at all, may by contract limit his responsibility.

BEST, C. J. — Then your client must give distinct notice to that effect: and if the public were told that he would not be liable either for the negligence of himself or his servants, he would not have many persons trust him.

Verdict for the plaintiff.

Vaughan, Serjt. and *Holt*, for the plaintiff.

Wilde, Serjt. for the defendant.

[Attornies—*Spencer*, and *Thompson*.]

Sittings in London, after Trinity Term, 1825.

HARDING v. DAVIES.

June 24th.

WORK and labor, and goods sold. Pleas—The general issue, and a tender of 10%.

To prove the tender, a woman who lodged in the defendant's house was called: she said that she was present

If at an interview between plaintiff and defendant, when defendant was willing to pay 10%, a third per-

son present offer to go up stairs and fetch that sum, but is prevented by the plaintiff's saying he cannot take it; such offer is a good tender: and although the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act.

1825.
HARDING
v.
DAVIES.

at an interview between the plaintiff and defendant, at which the defendant was willing to give the plaintiff 10*l.* and that she offered to go up stairs and fetch that sum; but the plaintiff said, she need not trouble herself, for he could not take it. She further stated, that she had the money up stairs. And that, although the defendant was present, he did not take any notice of her offer at the time.

Wilde, Serjt.—This will not do. There is a distinction between the case of a man having money in his hand, and another saying do not unroll it, and that of a party saying I have money up stairs, and will go and fetch it. This tender, also, was not made by the command of the defendant, he not attending to it at the time.

BEST, C. J.—He has ratified the act by pleading it. And I think the witness has proved a good tender. I agree, that it would not do, if a man said, I have got the money, but must go a mile to fetch it.

Wilde, Serjt. and *F. Pollock*, for the plaintiff.

Pell, Serjt. for the defendant.

[Attornies—*B. Davies*, and *Brutton*.]

See *Cheminant v. Thornton*, ante, p. 50, and *Laing v. Meader*, ante, Vol. 1, p. 257.

1825.

Adjourned Sittings at Westminster, after Trinity Term, 1825.

DOE, on the several demises of CLARK and Others, v.
SPENCER.

June 25th.

EJECTMENT. The count on which the plaintiff relied, was on the demise of Henry Dance, who was the provisional assignee of the court for relief of insolvent debtors. It did not appear that any assignment had been made by the provisional to any other assignee.

The provisional assignee of the insolvent debtors' court may maintain ejectment for the property of an insolvent, under the provisions of the 1st Geo. 4, c. 119, and the 3rd Geo. 4, c. 123.

Pell, Serjt. for the defendant.—The provisional assignee is not in a situation to maintain ejectment. He has the property lodged in his hands only *pro tempore*, previous to its being transferred to the assignee appointed by the creditors; and it is this latter assignee that must bring the action, which he can do under the authority of a meeting of creditors, with the approval of the commissioners. The provisional assignee is only a conduit-pipe to convey the property to the other assignee, for the benefit of the creditors. The 4th, 5th, 7th, and 11th sections of the stat. 1 Geo. 4, c. 119, go to shew this clearly.

BEST, C. J.—I am of opinion that s. 11, does not prevent the provisional assignee from exerting any right against the defendant. It is for the benefit of the creditors. The statute speaks of arrest. This does not look like a reference to ejectment. The estate is completely vested in the provisional assignee. It is not intended that the provisional assignee should retain the possession, but that he should afterwards assign to another assignee, whom the Court are to appoint; and the property is to remain in the provisional assignee, till such other assignee accepts

1825.
 {
 DOR
 v.
 SPENCER.

the trust; and probably in many cases it may be difficult to find any one willing to take it. I am therefore of opinion, that as it does not appear that any other assignment has been executed to any other assignee, the property continues in the hands of the provisional assignee, and he may maintain an action of ejectment for it.

Verdict for the lessor of the plaintiff.

Lawes, Serjt. and *E. Lawes*, for the plaintiff.

Pell, Serjt. for the defendant.

➤ [Attornies—*Croft*, and *Wegener*.]

IN the ensuing Michaelmas Term, *Wilde*, Serjt. moved for a rule *nisi* for a new trial, and mentioned, in addition to the sections of the 1 G. 4, referred to at *Nisi Prius*, the 2d. section of the 3 G. 4, c. 123. But the Court, after consideration, decided that, on the construction of both the statutes, it seemed not to be the intention of the legislature to clog the proceedings at the trial with the consideration of any such question, as whether the provisional assignee could maintain the action; and that it was not therefore matter of defence: but the party must apply by motion either to the insolvent debtors' court, or the Court in which the action was brought, as he should be advised, to gain relief upon the subject.

Rule refused.

By the 4th section of the insolvent debtor's act, 1 G. 4, c. 119, it is enacted that "such prisoner shall, at the time of subscribing such petition, duly execute a conveyance and assignment, in such manner and form as the said Court shall direct, of all the estate, right, title, interest

and trust of such prisoner to all the real and personal estate and effects of every such prisoner, except to the wearing apparel, bedding, and other such necessities of such prisoner and his or her family, not exceeding in the whole the value of twenty pounds, so as

to vest all such real and personal estate and effects in the provisional assignee of the said Court, subject to a proviso that in case such prisoner shall not obtain his discharge by virtue of this act, such conveyance and assignment shall, from and after the dismissal of the petition of such prisoner praying for his discharge, be null and void to all intents and purposes."

"§ 5. Provided always, and be it further enacted, that the said Court shall and may order and direct such provisional assignee, or such assignee or assignees as are hereinafter mentioned, to pay out of the said estate and effects before mentioned to the said prisoner, such allowance for his or her support and maintenance during such prisoner's confinement in actual custody as to the said Court shall seem reasonable and fit."

"§ 7. And be it further enacted, that when the said Court shall adjudge any prisoner to be entitled to his discharge, such Court shall appoint a proper person or proper persons to be assignee or assignees of the estate and effects of such prisoner for the purposes of this act; and when such assignee or assignees shall have signified to the said Court their acceptance of the said appointment, every such prisoner's estate, effects, rights and powers, vested in such provisional assignee as aforesaid, shall immediately be assigned by such provisional assignee to such assignee or assignees, in trust for the benefit of such as-

signee or assignees and the rest of the creditors of every such prisoner, in respect of or in proportion to their respective debts, according to the provisions of this act."

"§ 11. Provided, and be it also enacted, that no suit in law be proceeded in further than an arrest on mesne process, or suit in equity be commenced by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice to be given, at least fourteen days before such meeting, in the *London Gazette*, or other newspaper which shall be published in the neighbourhood of the last residence of such prisoner, for that purpose, and without the approbation of one of the commissioners of the said Court."

By stat. 3 Geo. 4, c. 123, § 2, it is enacted "that it shall be lawful for the provisional assignee to sue in his own name, if the said Court shall so order, for the recovery, obtaining and enforcing of any estate, debts, effects or rights of any such prisoner; and in case of the dismissal of the petition of any such prisoner praying for his discharge, which the said Court is hereby empowered to dismiss, whenever it shall seem fit, all the acts done before such dismissal by the said provisional assignee, or other persons acting under his authority, according to the order of the said Court, shall be good and valid."

1825.

DOE
v.
SPENCER.

1825.

Adjourned Sittings, in London, after Trinity Term, 1825.

July 5th.

DARNELL v. TRATT.

A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable: Held, that the statute of frauds did not apply, and it was proper to leave it to the jury to say, under those circumstances, whether the original credit was not given to the uncle.

ASSUMPSIT by the plaintiff, a schoolmaster, for the education of the defendant's nephew. The plaintiff was the master of a boarding school; the defendant, the uncle of a lad, who had been at the plaintiff's school. It appeared that the boy's mother took him to school, and had an interview with the master at the time; but no evidence was given of any thing that passed between them. It also appeared that the boy's father was living at that time, but had died not long after. When the boy had been some time at school, a bill was delivered by the plaintiff's son to the uncle, who said "that it was quite right to send him the bill, for he was answerable for young Jeremy;" that he could not conveniently pay it at that time, but would, when the next became due, settle both together.

Wilde, Serjt. argued, that the plaintiff should be nonsuited, on the ground that this was a mere collateral promise by the uncle, within the statute of frauds, and therefore ought to be in writing: and he argued, that parol evidence ought not to be received, as it did not go to prove any undertaking by the defendant, antecedent to the time when the debt was contracted.

BEST, C. J. — If you, who set up the statute, can shew that the original credit was given to somebody else, and not to the defendant, then the statute will apply, and the objection will be unanswerable. But, consistently with the decisions, I must receive the evidence. I think the statute of frauds has been put aside too much; and Westminster Hall now thinks so too. As at present advised, I am of opinion, that there is evidence to go to the jury of

an original undertaking on the part of the defendant. But I have no objection to the point being reconsidered. His Lordship then left the question to the jury, as to whom the credit was given.

1825.
DARNELL
v.
TRATT.

Verdict for the plaintiff, with leave to *Wilde*, Serjt. to move to enter a nonsuit, if the Court should think there was no evidence to go to the jury of the original credit being given to the uncle.

Bosanquet, Serjt. and *Comyn*, for the plaintiff.

Wilde, Serjt. for the defendant.

[Attornies—*Baddeley*, and *Pritchard*.]

IN the ensuing Michaelmas Term, *Wilde*, Serjt. moved, pursuant to the leave given. He contended, that it ought not to have gone to the jury as a question of credit. The mother took the boy, and she might have been called as a witness. The presumption was, that the credit was given to the mother. The defendant did not appear to have been any party to the original contract, and could only be charged under the statute of frauds; because, *prima facie*, the debt appeared to be the debt of another. There was no proof of the defendant interfering at any time before the debt was contracted; therefore the admission he made was not evidence for the jury. If the object of the statute is to prevent perjury, then it applied to this case, where the admission, if varied only by the tense, would be materially altered.

Nov. 8th.

PARK, J.—The verdict below was correct; and there is no objection to any thing done at the trial. The question is, whether the original undertaking was by the defendant or not. In every case of evidence, all depends upon a tense. It is said, that the acknowledgment was made

1825.
 DARNELL
 v.
 TRATT.

after part of the debt was contracted. What is more natural than that this woman should have a kind brother-in-law, and that she should have told the plaintiff so? If she had been called as a witness, observations would have been made upon her coming to destroy her own liability.

BURROUGH, J. — The verdict was quite right. The evidence was proper for the jury; and it was properly left to them. Why might not the jury infer that the mother was the agent of the uncle? This is made out by the admission.

GAZELEE, J. — I am of the same opinion.

BEST, C. J. — The evidence was proper for the jury, unless you can get rid of the cases which decide, that, where the man is sued who made the original promise, though it was no benefit to him, yet the statute does not apply.

Rule refused.

To constitute a promise to answer for the debt of another within the statute of frauds, it is necessary that the party whose debt it is, should be liable, as well as the person making the collateral promise, and such promise must be in writing. But if the party for whose benefit the promise is made is not also liable to pay, but only the maker of the promise, then such promise is not within the statute of frauds, and need not be in writing. The cases of *Jones v. Cooper*, Cowp. 227; *Matson v. Wharum*, 2 T. R. 80, and several other au-

thorities go to shew the former propositions. The cases of *Read v. Nash*, 1 Wils. 305; *Harris v. Huntbach*, 1 Burr. 373; and *Goodman v. Chase*, 1 B. & A. 297, establish the latter. But if a guarantie is made in writing, that satisfies the statute of frauds; and a promise, to take it out of the statute of limitations, need not be in writing. *Gibbons v. M'Casland*, 1 B. & A. 690. A written guarantie, to be binding, must state the consideration for the promise as well as the promise itself. *Saunders v. Wakefield*, 4 B. & A. 595.

1825.

ANDERSON v. SHAW.

July 6th.

ASSUMPSIT. Pleas—Non-assumpsit and a tender. The plaintiff did not appear, and was about to be nonsuited, when

A plaintiff may be nonsuited after a plea of tender.

Bosanquet, Serjt. and *Campbell*, who were for the defendant, argued, that, after a tender, a nonsuit could not take place. They cited *Gutteridge v. Smith*, 2 H. B. 377, and *Harding v. Spicer*, 1 Camp. N. P. C. 327.

BEST, C. J.—On the authority of these cases, I shall let the defendant have a verdict; but I feel strongly that it is incorrect.

Bosanquet, Serjt.—In this case a rule *nisi* was obtained for judgment as in case of a nonsuit; and the plaintiff opposed it on the authority of *Harding v. Spicer*.

Verdict for the defendant.

[Attornies—*Macdougall*, and *Gregson & F.*]

In the ensuing Michaelmas Term, *Onslow*, Serjt. obtained a rule *nisi* for setting aside the verdict entered for the defendant; which, after argument, the Court made absolute.

In the case of *Gutteridge v. Smith*, 1 H. B. 374, the principal point in dispute was, whether, if money were paid into court generally on the whole declaration, and one of the counts were on a bill, it was necessary to prove the defendant's handwriting to the bill, and the Court held that it was. (But on that point see *ante*, Vol. 1, p. 20, n. (b).) And Mr. Justice HEATH said, in

the course of his judgment, 2 H. B. 377, "It is clear, that after a tender, the plaintiff cannot be nonsuited." The case of *Harding v. Spicer*, 1 Camp. 327, was tried at Kingston before the same learned judge, and at that time that point was then so ruled. Mr. Campbell has, however, in a very able note to that case, collected authorities, which tend to shew that

1825.
 ANDERSON
 v.
 SHAW.

a plaintiff might be nonsuited on the plea of tender as well as any other plea, because a nonsuit is merely the plaintiff's declining to appear to hear the verdict.

July 12th.

TUCKER and Others, Assignees of GILBERT, a Bankrupt,
 v. RUSTON and Another.

The lodging a delivery order with a wharfinger, is sufficient to transfer the property in goods lying at a wharf, without any reweighing or rehousing; and if the party giving the order afterwards become bankrupt, his assignees cannot maintain trover under such circumstances, as for goods in his order and disposition.

TROVER for carraway seeds. It appeared from the evidence for the plaintiff, that, on the 12th of February, 1824, six casks of carraway seeds were housed in the bankrupt's name, at a wharf called Galley's Quay; and that on the 15th of March, 1824, the following order was lodged with the wharfinger:

“ 6th March, 1824.

“ Deliver to Messrs. T. and T. Ruston, or order, the six hogsheads of carraway seeds, rehoused to John Gilbert, on the 11th of February, 1824.

(Signed) John Gilbert.”

“ Indorsed, 15th March, 1824.

“ Deliver the annexed to our order.

T. & T. Ruston.”

They remained at the wharf till the 13th April, 1824, at which time they were delivered to a Mr. Raymond, in consequence of an order given by the defendants. There was no order to rehouse or transfer. Up to the time of the delivery to Raymond, the goods remained in the wharfinger's books in the name of Gilbert; and the rent was charged to him. But the wharfinger, who proved these facts, stated, in answer to a question from the Court, that if any one had come to inquire, he would have been told that the goods were the property of the defendants. The act of bankruptcy was committed by Gilbert, on the 11th of April, 1824. For the defendants, it was proved, that they had accepted a bill for the bankrupt for 300l. on these car-

raway seeds, which were worth 310*l.*, and in consequence received the order in question, and were to have a power of sale.

1825.
TUCKER
v.
RUSTON.

Taddy, Serjt. for the plaintiff, contended, that, upon this evidence, the goods belonged to the bankrupt at the time of the act of bankruptcy, and as such passed to his assignees—they had never been taken out of his name—there was no reweighing or rehousing, as in such cases there should be. The defendants were not vendees. They had advanced 300*l.* on an article worth 310*l.*: they had sold the article; and the question would be, how much they had a right to detain from the plaintiffs. There was no notorious act by which any one but themselves could know that there was any transfer of possession; and he cited *Knowles v. Horsefall*, 5 Barn. & Ald. 134.

Vaughan, Serjt., for the defendant, relied on the circumstance of their having a power to sell; and cited *Harmer v. Anderson*, 2 Camp. N. P. C. 243.

BEST, C. J.—The defendants in this case had an authority to sell. There is therefore no conversion. The 10*l.* cannot be recovered in this action, but must be sought in an action for money had and received. I am of opinion that the goods were not in the order and disposition of Gilbert, after the delivery order of the 6th March. I think the plaintiff should be called; but I am willing, if it is required, to leave the question to the jury.

Taddy, Serjt. thought that unnecessary; and the plaintiff was

Nonsuited.

Taddy, Serjt. and *F. Pollock*, for the plaintiffs.

Vaughan, Serjt. and *Campbell*, for the defendants.

[Attornies—*Stevens & Wood*, and *Parnther & Turner*.]

1825.

July 12th.

Assumpsit on a judgment of the Admiralty Court of Scotland, which gave interest on a balance of accounts from 1811 to the time of payment. The contract was by letter, written in London. The services were performed in Scotland, that being the plaintiff's place of residence. Held at *Ni. Pri.* that a contract made in England, to be executed in Scotland, ought to be regulated by the rules of the English law; and that this contract having been made in England, interest could not be recovered, merely because it was given by the decree in Scotland.

ARNOTT v. REDFERN and Another.

THE declaration stated, that in the year 1818, a decree was pronounced in the Admiralty Court of Scotland, which directed that the defendants should pay to the plaintiff a balance of 236*l.* "*with interest thereon, from the month of March, 1811, till the time of payment,*" together with other sums for expenses, &c.; and that in consequence of such decree, the defendants became liable to the plaintiff to the amount of the said several sums. The plea was — the general issue.

A certified copy of the proceedings in Scotland, under the seal of the Admiralty Court there, was put in and read.

It appeared, among other things, that the original claim was for services performed by the plaintiff, who resided in Scotland, in the sale of goods for the defendants, who lived in London. The contract was made by letters between the parties, both being at that time in London.

The plaintiff undertook to go four journies annually through Scotland, to sell and collect for the defendants, and to remit regularly all monies received; to guarantie one-fourth part of the sales, allowing his whole commission to stand over, for the purpose of making up any deficiency that might arise by bad debts, so far as the fourth part of the real losses. The defendants, in consequence of this undertaking, agreed to employ the plaintiff as their agent, and to pay him one *per cent* upon the amount of the sales, and $\frac{1}{4}$ *per cent* more upon the gross amount for the guarantie of the fourth part.

Vaughan, Serjt. objected to the claim for interest. This is only an action of assumpsit; and the judgment is merely *prima facie* evidence, and not conclusive as to the right of demand. We may impeach the claim now, as we might have done at the time when the matter was before the

Court in Scotland. The debt is not such a debt as would carry interest in England; and if error had been brought here, interest would not have been allowed.

1825.
ARNOTT
v.
REDFERN.

BEST, C. J.—Is there no doubt that interest would not have been allowed here?

Vaughan, Serjt.—I will admit that the balance of the accounts was properly recovered.

BEST, C. J.—Is it an English transaction? For, if it is, it will be regulated by the rules of English law; but if it is a Scotch transaction, then the case will be different.

Vaughan, Serjt.—It is a debt arising upon contract; and the contract was made in England; therefore, it must be considered as an English contract, though the services may be to be performed in Scotland. The plaintiff brought his action on this judgment in 1819; but, as a foreigner, being required to give security for costs, he lay by for six years, and now he claims interest for the whole of that time. The case of *Walker & Others v. Witter*, Doug. Rep. 1, is a very strong authority in favour of the defendants, for there Lord MANSFIELD says, that assumpsit will lie on foreign judgments; but they are only *prima facie* evidence of the debt, and are examinable: and his Lordship lays down, that in actions on judgments of foreign courts, and of courts in this country not of record, the Court in which such action is brought may examine into the justice of the decision of those courts, and cites an instance of Lord Chancellor HARDWICKE examining the justice of a decision of the House of Lords, because the original decree was in a court in Wales, which was not a court of record.

BEST, C. J.—This is the case of a Scotchman, who comes

1825.
 ARNOTT
 v.
 REDFERN.

into England and makes a contract. As the contract was made in England, although it was to be executed in Scotland, I think that it ought to be regulated according to the rules of the English law. This is my present opinion. These questions of international law do not often occur. I shall therefore direct the jury to find their verdict for the principal sum, and I will give the plaintiff leave to move to increase the amount by the addition of interest.

Verdict for the plaintiff.

Taddy, Serjt. and *Patteson*, for the plaintiff.

Vaughan, Serjt. and *Comyn*, for the defendants.

[Attornies—*Adlington & G.*, and *Wright*.]

ON the first day of the following Michaelmas Term, *Taddy*, Serjt. obtained a rule *nisi*, pursuant to the leave given, which came on to be argued in the course of the same Term.

Vaughan, Serjt. shewed cause.

Taddy, Serjt. was heard in support of the rule, and the Court took time to consider of their judgment.

Jan. 25th.

Their Lordships now gave judgment: but being of opinion, that by the law of England the plaintiff's balance would have carried interest, the point ruled at Nisi Prius was not determined by the Court.

Rule absolute for adding the interest.

1825.

*Further Adjourned Sitzings in London, after
Trinity Term, 1825.*

MAVOR, Assignee of HENRY PYNE, a Bankrupt, v. JOHN
PYNE.

Nov. 2d.

ASSUMPSIT for goods sold by the bankrupt to the defendant. Pleas—the general issue, and a release by Henry Pyne. Replication, that before the release was executed, the said Henry Pyne “became and was a bankrupt.” Issue thereon.

The action was brought to recover the price of certain numbers of a work, called “Pyne’s History of the Royal Residences.” From the evidence offered to support the petitioning creditor’s debt, it appeared that a sum of 115*l.* was due by the bankrupt for goods furnished to him by the petitioning creditor, the delivery of which commenced in 1812, and was completed in 1818.

Vaughan, Serjt. for the defendant, contended, that the statute of limitations applied to the debt, as it did not appear how much of the 115*l.* was due within six years.

Spankie, Serjt. for the plaintiff.—It must be pleaded.

Vaughan, Serjt.—The debt is not a legal debt. We could not plead the statute. We knew not what debt they would rely on. It must appear that the debt is a good petitioning creditor’s debt.

Comyn, on the same side. It must be such a debt as

If a party agree to take a work which is to be published in 18 numbers, at intervals of two months, and after receiving several numbers refuses to take any more, and also to pay for those which he has had, an action will lie for the price of the latter; and the statute of frauds does not apply, although the original contract was not to be executed within a year; for the law in such case will imply a further contract to pay for each number as it is delivered.

A debtor to a bankrupt, when sued by his assignee, cannot set up the statute of limitations as an objection to the petitioning creditor’s debt.

An allegation, stating that before the execu-

tion of a certain release, the party who executed it “became and was a bankrupt,” is supported by proof of his having executed it after an act of bankruptcy, which was not followed by a commission for nearly two years, it appearing that the execution took place while the party was in prison.

1825.
 MAJOR
 v.
 PYNE.

case of *Boydell v. Drummond* to this. In that case, the numbers were some of them delivered and payed for; and the action was brought for the price of those numbers which the party would not take; and it was held that the publisher could not recover for them; because the contract was clearly within the statute, not being to be performed within a year. But the plaintiff in this case does not go for more than the price of the numbers delivered; and for them he may recover.

Vaughan, Serjt.—The question remains: Is this one entire contract?

BEST, C. J.—*Le Blanc*, J. in that case says; that you have a right to drop it whenever you please; and I am of his opinion.

Spankie, Serjt.—The difference is, that in *Boydell v. Drummond* the contract was *executory*; and in this it is *executed*.

Vaughan, Serjt.—In the case of *Boydell v. Drummond*, the defendant had actually signed his name to a list of subscribers, which made it still stronger; and in this case, where is there any obligation to pay for one number though it is accepted? Can it be said that the plaintiff may bring an action *toties quoties* for every number?

BEST, C. J.—If this case touched upon the principles laid down in *Boydell v. Drummond*, I should feel myself bound by the authority of that case. And even if I differed in opinion, it would govern me, sitting at *Nisi Prius*. But I subscribe to every word of it. If any inference at all can be deduced from that judgment bearing upon this case, it is an inference unfavourable to the objection which has been made to-day. I will state my brother *Vaughan's*

proposition, and then he will see how monstrous a proposition it is, and how inconsistent with common sense and common justice, and how unlikely it is, that a court of justice should ever have entertained it.—He says, that it is an entire contract. I agree with him that it is so. But he says, that if there were twenty-four numbers, and twenty-three of them were delivered, and the twenty-fourth was not, the publisher could not recover for the twenty-three. I am of opinion, that there is a subordinate contract; an understanding that each number is to be paid for on delivery. It must be well known to the gentlemen of the jury, that in this city a similar course is constantly adopted in the cases of contracts for the sale of corn. It is necessary that publishers should have the money for each number as it comes out, in order that they may be able to go on with the work. This is always their object, and my brother *Vaughan's* argument goes to overthrow this. The object of purchasers is the same, because it is not convenient for them to pay for the whole work at once. Taking it to be a contract for the whole, yet it is in part executed. But I will put this case on another ground. The evidence is, that the defendant agreed to take the numbers, and actually took and kept six, seven, or eight. He said, I shall not pay, because you have not given me the whole. To this it was answered—“You may have the remainder; but we did not agree to deliver.” In common sense, can a man say—“I will not pay for the eight which I have had; and I will not take any more?” When the first contract was broken off, when the defendant said, “I will not take the whole,” I think an implied contract was raised, which may be enforced in this form of action.

1825:
MAVOR
v.
PYNNE.

With respect to the release pleaded, it appeared that it was executed in April, 1820, by the bankrupt, while he was in prison, and after he had committed an act of bankruptcy. But it appeared that no commission issued against him till the year 1822.

1825.
 MAVOR
 v.
 PYNL

Upon this state of facts, it was submitted on the part of the defendant, that, under the stat. 46 Geo. 3, c. 135, the issue as to the release must be found for him.

BEST, C. J. — I am of opinion at present, that it is proved, that the release was executed after an act of bankruptcy, and, therefore, that issue must be found for the plaintiff.

Verdict for the plaintiff—8*l.* 8*s.*

Spankie, Serjt. and *Moody*, for the plaintiff.

Vaughan, Serjt. and *Comyn*, for the defendant.

[Attornies—*Van Sandau & T.*, and *Walker, R. & R.*]

IN the ensuing Michaelmas Term, *Vaughan*, Serjt. moved for a rule nisi for a new trial, on the ground that the agreement was within the statute of frauds; but the Court were of opinion, that the case was distinguishable from that of *Boydell v. Drummond*, on which he had founded his argument, and that the statute did not apply. He then went on the point reserved as to the sufficiency of the petitioning creditor's debt.

BEST, C. J. observed, that *Quantoek v. England* was in point, in its favour; and that the case in 15 Vesey, confirmed *Quantoek v. England*; and overruled a holding at Nisi Prius, which was contrary to it.

Vaughan, Serjt. — We could not plead the statute of limitations, and therefore are in the same situation as if it had been pleaded.

BEST, C. J. — A co-creditor may say that a man, whose debt is barred by the statute of limitations, shall not prove under the commission; and that objection must be made in Chancery by petition. In this case, the bankrupt does

not make the objection; and why should a party be allowed to do it, standing in the situation of this defendant?

1825.

MAVOR

v.

PYNE.

GAZELEE, J.—The statute of limitations is for the benefit of the debtor, that he may not be harassed; but a person situated as this defendant is, has no right to use it as an objection to the debt of another person.

The point as to the release was then mentioned; but the Court were of opinion, that, on the state of the pleadings, that question had received its proper determination at *Nisi Prius*; and therefore, upon all the points, the

Rule was refused.

MUNN v. GODBOLD and Another.

Nov. 2d.

COVENANT on a deed, dated in September, 1819. The declaration stated, that the defendants had agreed to appoint the plaintiff their agent for the sale of their vegetable balsam, on the continent of Europe; and that, in consideration of 400*l.*, they were to furnish him with such a quantity as, if sold at 20 francs, would realize a sum of 600*l.*, and give him a profit of 50*l.* *per cent.* It then went on to allege, that the defendants covenanted, that, in case the whole 600*l.* worth could not be disposed of by the plaintiff, the defendants should take back such part as remained; and then averred, as a breach, that there was a quantity unsold, which the defendants refused to receive again. Pleas—*Non est factum*, and several special pleas, not material to the point decided.

It appeared, that there were two parts of the deed declared on, one executed by the plaintiff, and the other by the defendants. The part executed by the defendants was lost from the plaintiff's custody, and was not forthcoming

If there are two parts of a covenant under seal, one of them on a stamp and executed by the defendant, and the other a counter-part not stamped, and the party who had the custody of the part which was stamped, at the time of bringing an action upon it has lost it, and it cannot be produced, he may prove the draft as secondary evidence, and is not compellable to take the unstamped counter part, subject to the objections that may be made to it, although he has

given notice to the defendant to produce it at the trial.

1825.
 MUNN
 v.
 GODBOLD.

at the trial. It had been properly stamped. The counterpart in the possession of the defendants was in Court, ready to be put in; and notice had been given to them to produce it. It was stated not to have any stamp.

For the plaintiff, the attorney, who prepared the deed, was called to give evidence of its contents from the draft. He proved, that it contained a true copy of the instrument, in the state in which it was signed.

Taddy, Serjt. objected to the admissibility of this evidence. They are not at liberty to give the draft in evidence, but must put in the counterpart. They have given us notice to produce it; and we are willing to put it in. The deed is not perfect without the counterpart; and the counterpart is the next best evidence, when one part is lost. It is so in the case of a lease. *Roe dem. Urry v. Harvey*, 4 Burr. 2484 (a).

BEST, C. J.—How could they get at this counterpart for the purpose of having it stamped?

Taddy, Serjt. —They might move in Court for the other party to attend with it at the Stamp-office.

BEST, C. J.—The last decision in the Common Pleas is, that a party is not compellable to produce a deed, unless he holds it as a trustee.

Pattison, on the same side, cited the cases of *Rex v. Castleton*, 6 T. R. 236, and *Rippener v. Wright*, 2 B. & A. 478.

<p>(a) In that case, (p. 2489) Lord MANSFIELD observed, that “in civil cases the Court will force parties to produce evidence which may prove against themselves, or leave their refusal to do it (after proper notice), as a strong presumption to the jury. The Court will do it in many cases, under</p>	<p>“ particular circumstances, by rule “ before the trial, especially if the “ party from whom the production “ is wanted applies for a favor. “ But in a criminal or penal cause, “ the defendant is never forced to “ produce any evidence, though “ he should hold it in his hands in “ Court.”</p>
---	--

Vaughan, Serjt. — Their counterpart gives us no cause of action. We declare on the instrument executed by them; and we are to produce that or give secondary evidence of its contents. We are not to be driven to their counterpart. It is said, that the counterpart is better evidence than the draft; but it is not stamped; and therefore it is of no validity at all. The cases go this length only, that, where there is only one instrument, and that is in the hands of one of the parties to it, he shall be compellable to produce it, because he holds it as a trustee for both.

1825.

 MUNN
 v.
 GODBOLD.

BEST, C. J. — I shall admit the draft as secondary evidence.

Verdict for the plaintiff.

Vaughan, Serjt. *Chitty*, and *Lee*, for the plaintiff.

Bosanquet and *Taddy*, Serjts. and *Pattison*, for the defendants.

[Attornies—*Steel & Nicol*, and *J. & H. Lowe*.]

IN the ensuing Michaelmas Term, *Bosanquet*, Serjt. obtained a rule *nisi* for a new trial, on the ground that the draft ought not to have been admitted as evidence under the circumstances. He cited, in addition to the cases mentioned at *Nisi Prius*, *Rivers v. Rivers*, 2 Atk. 21.

The question came on to be heard in the course of the same Term; and the Court, after argument, decided, that the draft was properly admitted in evidence, and therefore

Discharged the rule.

1825.

COURT OF KING'S BENCH.

*Sittings at Westminster, after Michaelmas
Term, 1825.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

Dec. 5th.

STUART and Another *v.* WHITAKER and Another, Sheriff
of Middlesex.

If the attorney for an execution creditor, on being informed of a claim by the landlord for rent, direct the sheriff's officer to withdraw the execution, and he do so, and the plaintiff sue out a *ca. sa.* for the debt, such execution creditor cannot bring an action against the sheriff for falsely returning to the *fi. fa.* that so much rent was due; and he will not be entitled to recover though he shew that the supposed landlord had not a right to the rent claimed; and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was.

CASE against the late sheriff of Middlesex for a false return to a writ of *testatum fieri facias*, sued out against James Phillips, to levy the sum of 20*l.* 10*s.* at the suit of the plaintiffs. The declaration stated, that the sheriff returned, that they had caused to be seized divers goods to the value of 40*l.* and no more; and that, after the seizure, they received notice from the landlord of the premises whereon the goods were seized, that the sum of 36*l.* remained due to him for arrears of rent, which rent did not exceed one year's rent of the premises, and notice from the collector of taxes, that 9*l.* 13*s.* 6*d.* was due for king's taxes; and "they further certified and returned, that the said rent and taxes, so claimed as aforesaid, were, at the time of such seizure, due and in arrear, and that the said plaintiffs had not paid the rent and taxes due as aforesaid, pursuant to the statutes," &c.; whereas, in truth and in fact, the defendants did not receive notice from the landlord of the premises, whereon, &c. that the sum of 36*l.* or any other sum remained due for the rent, &c.; and whereas, in truth and in fact, the said rent was not, nor was any part thereof due at the time of the seizure, by means whereof the plaintiffs were greatly injured, &c. Plea—The general issue.

The usual formal proofs having been adduced for the plaintiff, it was shewn by a lease, dated April 21st, 1754,

and other subsequent conveyances, that the residue of a term of eighty-one years from that time, in the house occupied by Phillips, had belonged to a Mrs. Hooper; and it was proved that Mrs. Hooper died on the 6th of March, 1824; and by the probate of her will, which was put in, it appeared that she left Phillips (the person against whom the execution issued) and Miss Millicent Rosamond Stone, her executor and executrix; and by her will Mrs. Hooper devised this house to Miss Stone. The execution was sent unto Phillips's house, on the 29th of May, 1824. Phillips, on being called as a witness for the plaintiff, proved, that he had rented the house of Mrs. Hooper at 36*l.* a-year, and that after the execution came in, Miss Stone put in a distress for the year's rent; and the plaintiff's attorney, on being apprised of this, directed the sheriff's officer to withdraw the execution; and the officer accordingly sent away his man, who had previously kept possession: and it was further proved, that the plaintiffs caused him (Phillips) to be taken on a *capias ad satisfaciendum*, on the 18th or 19th of June, 1824, for this same debt.

1825.
 STUART
 v.
 WHITAKER.

Gurney and Holt, for the defendants. — In this case the plaintiff must be called; because, when a sheriff receives notice that rent is due, the plaintiff cannot call on him to sell, till he (the plaintiff) has satisfied the rent, which, in this case, was clearly due to somebody; and, by the terms of the statute of 8 Ann. c. 14, § 1, the sheriff is not to pay the rent claimed, but the plaintiff is to cause it to be paid. However, that question can hardly be raised here, as the plaintiff's attorney, on being apprised of the claim of rent, himself directs the execution to be withdrawn on that ground; and after that he cannot turn round and dispute the claim to rent.

Scarlett, contra. — Phillips was never a tenant to Miss Stone; and, this property being leasehold, it vested in the executors; and even if this house was given by Mrs. Hoop-

1825.
 {
 STUART
 v.
 WHITAKER.

er's will to Miss Stone, the rent due before Mrs. Hooper's death would belong to the executor and to Miss Stone.

ABBOTT, C. J. — You withdraw the execution, and sue out a *capias*; and I think that the act of the plaintiffs in so doing is an assent to the claim of the supposed landlord.

Scarlett. — I am in a condition to prove, that, when the execution was withdrawn, it was done in ignorance of the real circumstances.

ABBOTT, C. J. — I think that makes no difference. I think that the fact of the plaintiffs' having withdrawn the execution, precludes them from saying that this is a false return.

Scarlett. — If the sheriff had returned, that the plaintiffs directed him to withdraw, that might make a difference; but here the sheriff returns certain things as specific facts, which we deny, and come here to try: we can prove, that the plaintiffs were ignorant of the real state of facts till after the execution was withdrawn.

Evidence was given, that the plaintiffs' attorney did not know the nature of Miss Stone's title to the house, till after they had withdrawn the execution.

ABBOTT, C. J. — The plaintiffs' attorney did not direct the officer to go back again, but sued out a *capias*. I am of opinion, that the conduct of the plaintiffs is such as to warrant the sheriff in making this return, and that the plaintiffs cannot now maintain this action.

Nonsuit.

Scarlett and Comyn, for the plaintiffs.

Gurney and Holt, for the defendants.

[Attornies—John, and Smith & B.]

By the stat. of 8 Ann. c. 14, § 1,	“ lands or tenements, which are
it is enacted, that “ no goods or	“ or shall be leased for life or lives,
“ chattels whatsoever, lying or be-	“ term of years, at will or other-
“ ing in or upon any messuage,	“ wise, shall be liable to be taken

“ by virtue of any execution on any
 “ pretence whatsoever, unless the
 “ party at whose suit the said exe-
 “ cution is sued out, shall before
 “ the removal of such goods from
 “ off the said premises, by virtue of
 “ such execution or extent, pay to
 “ the landlord of the said premises,
 “ or his bailiff, all such sum or sums
 “ of money as are or shall be due
 “ for rent for the said premises, at
 “ the time of the taking such goods
 “ or chattels by virtue of such ex-
 “ ecution; provided the said ar-
 “ rears of rent do not amount to
 “ more than one year’s rent; and
 “ in case the said arrears shall ex-
 “ ceed one year’s rent, then the said
 “ party, at whose suit such execu-
 “ tion is sued out, paying the said
 “ landlord or his bailiff one year’s
 “ rent, may proceed to execute his
 “ judgment, as he might have done
 “ before the making of this act;
 “ and the sheriff or other officer is
 “ hereby impowered and required
 “ to levy and pay to the plaintiff,
 “ as well the money so paid for
 “ rent, as the execution money.”

In the case of *Hemlet v. Simpson*, 2 Wils. 140, it was held, that this statute applied to executions sued out on the part of the defendant, as well as to those sued out on the part of the plaintiff, and the executor or administrator of a landlord is within its provisions as well as the landlord himself. *Polyssir v. Windham*, 1 Str. 212. But a ground landlord is not entitled to his rent under this statute, which only respects immediate landlords. *Bennett’s case*, 2 Str. 787. And if there be an execution sued out,

and the landlord paid a year’s rent, and soon after another execution come in, he is not entitled to another year’s rent out of it though it be due; because it is his own laches, if he let more than one year’s rent run in arrears. *Dod v. Sarby*, 2 Str. 1024.

The landlord is not entitled to rent not due at the time of the taking of the goods, nor to that which becomes due while the sheriff remains in possession; unless the sheriff remains in possession beyond a reasonable time, so as to injure his rights; when he may maintain an action on the case. *Hoskins v. Knight*, 1 M. & S. 245.

If the rent is not paid to the landlord by the sheriff he must quit, and if he does not, a special action on the case lies against him, after notice of the rent due; or the landlord may move the Court that proceeds of the goods may be given up to him. *Henckett v. Kimpson*, 2 Wils. 140. But he cannot maintain an action for money had and received. *Green v. Austin*, 260. And in *Smith v. Russell*, 3 Taunt. 398, it was held that the landlord was bound to give notice to the sheriff that the rent was due. If the landlord accepts an undertaking from the sheriff’s officer to pay the rent, and suffer him to remove the goods, the landlord cannot maintain an action on the statute, though the undertaking be not valid, from not expressing the consideration. *Rothery v. Wood & Another*, 3 Camp. 24. And such an undertaking is not within the statute of frauds. 3 Esp. 66.

1825.
 STUART
 v.
 WHITAKER.

1825.

Dec. 5th.

An indorsee of a bill of exchange cannot recover against acceptors of a bill accepted by one who was formerly a partner, if such person had ceased to be a partner at the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner, as if he allowed his name to remain on the door of the house of business, or the like.

If one of the partners gave notice to a witness that they had ceased to be partners, that might be evidence for the defendants, but a conversation between the witness and one of the defendants, in which he so stated, is clearly not so.

DOLMAN *v.* ORCHARD, TRISTON, and BINNS, Gents.
three, &c.

ASSUMPSIT by the plaintiff as indorsee of a bill of exchange, against the defendants, as acceptors. The bill was dated Feb. 23rd, 1825, and drawn by Mr. Thomas Young, at one month after date, and addressed to Messrs. Orchard, Triston, & Co. It was accepted "James Orchard." The defendant Orchard had let judgment go by default. The real question was, whether the defendant Binns was liable, on this acceptance. For the plaintiff, it appeared, that all the three defendants had been partners, carrying on the business of attornies, and that the names of all three were upon the office-door, so late as January, 1825; and the person who presented the bill for acceptance believed the names remained at that time.

The plaintiff's counsel offered evidence of the bill being accepted for goods sold to all the three jointly.

ABBOTT, C. J.—That is not evidence in an action by an indorsee; because, to support this action, the defendants must have been partners at the time of the acceptance.

Evidence was then given, that they had sent in a joint bill to a client, in which was included a charge of 5s., and of 13s. 4d. for business done after the time of the acceptance.

Scarlett, for the defendants, wished to ask one of the plaintiff's witnesses, whether he had not been told by the defendant Binns, at a time long antecedent to this acceptance, that he had ceased to be a partner.

ABBOTT, C. J.—What he said cannot be evidence for himself.

Scarlett.—I submit, that what each partner said is evidence in this way. If he told the witnesses that they were

not partners, that would be proof that they did not hold themselves out to the world as partners.

1825.
DOLMAN
v.
ORCHARD.

ABBOTT, C. J.—If they gave notice to the witnesses that they were not partners, that might be evidence; but the conversation of one of them, in which he stated that, is certainly not so.

The defence was, that Mr. Binns had ceased to be a partner several months before the acceptance; and some evidence was given to shew that his name was not on the office-door at that time.

ABBOTT, C. J.—The question in this case is, whether Mr. Binns was a partner at the time of the accepting of this bill; or whether, having been previously a partner, he had, by his acts, given the world reason to believe that he was still a partner. At an antecedent period he was admitted to be so; but though this bill was accepted for a partnership debt, yet he will not be liable on this acceptance, unless he was a partner at the time of the acceptance being given, or unless he so conducted himself as to induce the world to believe that he was still in partnership with the other defendants. A bill of fees, containing two charges as late as the month of March, has been put in, for the purpose of shewing him to be a partner down to that time; but as they are of two very small sums for business done in causes commenced at a period of time when he was a partner, very little reliance can be placed on them, especially as the bulk of the bill is for business of a much earlier date. To shew that he held himself out to the world as a partner, evidence has been adduced to shew that his name was continued painted on the office-door as late as January or February. If the name was continued over the door, that was certainly inducing persons to believe that he continued a partner; and therefore the questions of fact in this case are two; 1st, Had Mr. Binns actually ceased to be a partner at the time of the accepting of this bill?

1825.
 }
 DOLMAN
 v.
 ORCHARD.

And *2nd*, if he had, whether he held himself out as a partner, by suffering his name to remain on the office-door? If either of these questions be found in the affirmative, the plaintiff is entitled to recover.

Verdict for the defendant Binns, and against the other defendants for the amount of the bill and interest.

Comyn, for the plaintiffs.

Scarlett, for the defendant.

[Attornies—*J. Searle*, and *Binns*.]

See the cases of *Newsome v.* and the cases there cited. And *Coles*, 2 Camp. 617 & 620, (n). *Lloyd v. Ashby*, post. *Wrightson v. Pullan*, 1 Stark. 375,

Dec. 5th.

CHADWICK v. BUNNING.

In an action for an apothecary's bill, it is necessary, since the stat. 6 Geo. 4, c. 1, § 3, to prove that the seal affixed to a certificate to practise as an apothecary is the common seal of the Apothecaries' Company.

An apothecary is entitled to recover for business done in London, if he had a general certificate from the Apothecaries' Company of his fitness to practise, although he paid but 6l. 6s. on his obtaining it.

ASSUMPSIT for an apothecary's bill. Plea—General issue.

It was proved that the business was done, and that the charges were reasonable.

Russel.—I am afraid your Lordship will hold, that since the passing of the act, 6 Geo. 4, c. 133, the plaintiff must give evidence that the seal attached to his certificate is the common seal of the Apothecaries' Company.

ABBOTT, C. J.—I think you must prove it to be the common seal (a).

(a) The stat. of 6 Geo. 4, chap. 133, § 7, after reciting 'that the 'qualification of such persons as 'authenticating the certificates of 'have been or shall be examined 'by the court of examiners, in

The beadle of the Company proved that it was their common seal, and that 6*l.* 6*s.* had been paid for the certificate, and the certificate was read: it was dated October 14, 1819, and was a *general* certificate of the fitness of the plaintiff to practise as an apothecary, without containing any restriction as to place; but on it was indorsed a receipt for 4*l.* 4*s.* paid to the company, for a permission for the plaintiff to practise in London, but this was paid in the month of June last, which was since the action was brought. The business appeared to have been all done in London.

1825.
 }
 DOLMAN
 v.
 ORCHARD.

Scarlett, for the defendant, contended, that under these circumstances the plaintiff was not entitled to recover; for, by the 19th section of the stat. 55 G. 3, c. 194, it is enacted, that ten pounds ten shillings shall be paid for the certificate, by every person intending to practise in London, or within ten miles, and six pounds six shillings by every one intending to practise in any other place but London. Now for the certificate taken out by the plaintiff he had paid 6*l.* 6*s.*, which allowed him only to practise in the country. It was certainly proved that since the action he had paid the other 4*l.* 4*s.*, which he might do under the latter part of the 19th section of the act, to allow him to practise in London, but that was done too late to entitle him to recover.

ABBOTT, C. J.—The prohibition in the 19th section against apothecaries, who have obtained their certificates,

‘pursuance of the aforesaid act,
 ‘has been attended with consider-
 ‘able expense, and might often be
 ‘difficult of proof, if such certifi-
 ‘cates were required to be authen-
 ‘ticated in different parts of Eng-
 ‘land at the same time in different
 ‘actions’ enacts, “That from and
 “after the passing of this act, the
 “common seal of the said society
 “of the art and mystery of apothecaries

“aries of the city of London,
 “shall be deemed to be and shall
 “be received in every court of law
 “or equity in any part of England
 “or Wales, as sufficient proof of
 “the authenticity of the certificate
 “to which such seal shall be affix-
 “ed, and that the person therein
 “named is duly qualified to prac-
 “tise as an apothecary in any part
 “of England or Wales.

1825.
 }
 DOLMAN
 v.
 ORCHARD.

practising in London, is as to any person who has "obtained a certificate to practise as an apothecary in any other part of England or Wales, except the city of London," and within ten miles. Now that appears to contemplate certificates for the country only; but this certificate is perfectly general, it certifies the plaintiff's fitness to practise without any regard to place. It is certainly shewn that he paid but six guineas for it; but the words of the act are, "No person having obtained *a certificate to practise in any other part of England or Wales, except London, &c.* shall be entitled to practise" in town. Now the plaintiff had not a certificate in that limited way, but a general certificate, that he is entitled to practise every where; and I think therefore that he is entitled to recover (*b*).

Verdict for the plaintiff.—Damages 1*l.* 13*s.*

(*b*) By the stat. 55 Geo. 3, c. 194, § 19, it is enacted, "That the sum of ten pounds ten shillings shall be paid to the said master, wardens, and society of apothecaries, for every such certificate as aforesaid, on obtaining the same, by every person intending to practise as an apothecary within the city of London, the liberties or suburbs thereof, or within ten miles of the same city; and the sum of six pounds six shillings by every person intending to practise as an apothecary in any other part of England or Wales (except the said city of London, the liberties or suburbs thereof, or within ten miles of the said city); and no person having obtained a certificate to practise as an apothecary in any other part of England or Wales (except the said city of London, the liberties or suburbs

thereof, or within ten miles of the said city as aforesaid), shall be entitled to practise within the said city of London, the liberties or suburbs thereof, or within ten miles of the said city, unless and until he shall have paid to the said master, wardens, and society, the further sum of four pounds four shillings, in addition to the said sum of six pounds six shillings so paid by him as aforesaid, and shall have had endorsed on his said certificate, a receipt from the said master, wardens, and society, for such additional sum of four pounds four shillings; and the sum of two pounds two shillings by every assistant; and the several sums of money arising from the granting of such certificates shall be applied in manner hereinafter directed."

HIS Lordship gave *Scarlett* leave to move to enter a nonsuit on this latter point, if the Court above should entertain a different opinion.

1825.
DOLMAN
v.
ORCHARD.

Russel and *Ryan*, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Friswell*, and *Caslon*.]

DIXON v. DEVERIDGE.

Dec. 6th.

ASSUMPSIT for goods sold. Plea—General issue. The cause was undefended.

A witness was called, who proved that he had had a conversation with the defendant, in which the defendant stated that the plaintiff had sent him a letter asking for payment, and as he justly owed it, he would pay as soon as he could. No notice had been given to the defendant to produce the letter, and no evidence of the amount due could be given.

ABBOTT, C. J.—As no evidence is given of the amount of the debt, the jury cannot know how much to find a verdict for; but as the defendant, by this conversation, admits something to be due, the plaintiff is entitled to nominal damages.

Assumpsit for goods sold. If a defendant say that he owes the debt, and that the plaintiff has applied to him to pay him, and that he will do so as soon as he can, but does not mention any sum. On evidence of this the plaintiff is entitled to a verdict, with nominal damages.

Verdict for the plaintiff.—Damages 1s.

Kelby, for the plaintiff.

[Attornies—*Farden*, and *Norton*.]

1825.

Dec. 6th.

To support a plea that the trustees under a private act of Parliament did not "*allow or permit*" the defendant to have the exclusive privilege of collecting dust and ashes in a certain place, it is necessary to prove some positive act of obstruction on their part; and it is not enough to prove that a third party took it away, having a right to it.

And it seems that this fact is no answer to an action on a written contract to pay a certain sum for the dust of a parish, but the party must seek relief in Equity.

TOWNSON v. GREEN, DAVIES, and MIERS.

DEBT on bond for the performance of a contract, dated July 18, 1823, made between the defendant Miers (the other defendants being his sureties) and the trustees for cleansing and lighting the parish of St. George, in the county of Middlesex, (acting under a private act of Parliament, of the 46 Geo. 3), by which the defendant Miers, "in consideration of *being allowed* the exclusive privilege of collecting the dust, cinders, &c. of the said parish, within such parts of the said parish as were not within the liberty of the Tower of London," agreed to pay 450*l.* a-year for the same. The declaration proceeded to aver the execution of the contract, and that the trustees did "allow and permit to the defendant the exclusive privilege, &c.," and stated, that, in breach of the contract, he had refused to pay 112*l.* 10*s.* part of the 450*l.*

Pleas—1*st*, General issue: 2*d*, That the trustees *did not allow or permit* Miers the exclusive privilege of collecting, &c. the dust, cinders, &c. of the said parish, except as in the agreement excepted.

The plaintiff was clerk to the trustees, who acted under a private act of Parliament, of the 46 Geo. 3, c. 77; by the 9th section of which they are empowered to sue and be sued by their clerk. The contract and bond were put in, and were in the terms stated in the declaration.

The defendants' counsel opened that a part of the Commercial Road, to the extent of 138 houses, was situate within that part of the parish of St. George, which was not within the liberty of the Tower, and that by a private act of Parliament of the 42 Geo. 3, c. 101, § 104, for lighting and cleansing the Commercial Road, it was enacted, that the trustees of that road might contract for the cleansing it, and all places within 100 feet of it; and that the person so contracting should have the dust, ashes, &c. from all houses, &c. within those limits; and the private

act of 5 Geo. 4, c. 144, confirmed that enactment as to the Commercial Road; and in fact the defendant Miers could not obtain the dust, ashes, &c. from that part of the Commercial Road, these being held by the person contracting with the Commercial Road trustees. They therefore argued that this was exactly like the case of a landlord, who, if he lets to a tenant, and it appear that the tenant is evicted from any part of the premises, the landlord cannot recover the rent.

1825.
TOWNSON
v.
GREEN.

ABBOTT, C. J.—You do not state that in your plea; you do not plead that you were evicted; but you plead that the trustees did not “permit and suffer” you to have the dust; now that implies some positive act of obstruction on their part. I doubt whether on these facts the defendant could have framed any defence upon this record, that would be an answer to this action; but that he may not have to go into equity for relief, I should recommend a reference.

Verdict for the plaintiff.—Damages 110*l.*, subject to a reference as to the amount to be deducted for the Commercial Road.

Gurney and *Richards*, for the plaintiff.

Scarlett and *Holt*, for the defendants.

[Attornies — *Townson*, and *May*, Senr.]

1825.

Adjourned Sittings in London, after Michaelmas Term, 1825.

Dec. 8th.

POPE, Assignee of DIXON, v. MONK.

If a debtor to a bankrupt's estate, on being applied to by a person whom he knows to be the collector of debts for the assignee, says, "I will call and pay the money," such promise is an admission of the right of the assignee, and renders it unnecessary in an action for the money, to give the usual proofs in support of the commission.

ASSUMPSIT for goods sold by the bankrupt to the defendant.

The collector appointed by the assignee to get in the debts due to the bankrupt's estate, proved that he made a demand on the defendant for 8*l.* 17*s.* 3*d.*; and it appeared from the evidence that the defendant knew that he came from the assignee. The defendant, in answer to the application said, "I will call and pay the money."

Thessiger, for the defendant.—Does your Lordship think that this dispenses with proof of the petitioning creditor's debt, and the other steps necessary to support the commission?

ABBOTT, C. J.—No doubt it does. He is called on to pay to the assignee, and his answer is, that he will.

Verdict for the plaintiff.—Damages, 8*l.* 17*s.* 3*d.*

Gurney, and *F. Pollock*, for the plaintiff.

Thessiger, for the defendant.

[Attornies—*Pope & B.*, and *Platts.*]

1825.

Dec. 8th.

MONTRIOU, Gent. *v.* JEFFERYS.

ASSUMPSIT on an attorney's bill. Plea—The general issue.

The plaintiff, Mr. Montriou, happening to be in Suffolk in the month of November, 1821, was applied to on a Saturday by the defendant, and several other farmers, to attend for them before two magistrates on the following Monday, they having been summoned for non-payment of tithes. They said they relied on a *modus*. He told them it was impossible to find out evidence before the Monday, and as he was obliged to go to London, it was arranged that he should instruct a Mr. King, an attorney of the neighbourhood, who was also clerk to the magistrates, to act as his agent, and attend for them, and request that the case might be put off for two or three days. The parties were also told, that it would not be necessary for them all personally to attend. Accordingly, on the Monday, the magistrates were requested to put off the hearing, which they would have done if the lessee of the tithes had consented; but he would not do so, unless some expenses were paid; which proposition such of the parties as were present refused to accede to. The case went on, and no defence being made, the tithes were ordered to be paid. Mr. Montriou returned into the country in the following week, and applied to the magistrates, who expressed a willingness, if they could, to alter their decision; but the lessee of the tithe in whose favour the order had been made, refused to give his consent that the case should be opened again, and the matter remained as it was. Mr. Montriou then advised the parties to appeal to the sessions—they all did so. When the appeals came on to be heard, the magistrates at the sessions said, that as the order had been obtained without the defendants going into their case as they ought to have done, or shewing to the two justices at the time that the question was of such a nature that they could not entertain it, they would not allow the lessee

An attorney is not to lose the amount of his bill, on account of any error in the execution of his duty, being such an error as a cautious man might fall into; but if the charges contained in his bill are brought upon his client by his inadvertence, he cannot recover them in an action.

1825.
 MONTRIOU
 v.
 JEFFERIES.

of the tithes then to be taken by surprise by the production of a new case. They, however, stated the circumstances for the opinion of the Court of King's Bench, and that Court confirmed their decision.

It appeared that at the hearing on the Monday, the two justices were informed that the defence set up was a *modus*, and that the parties were not prepared to give any specific evidence of it: but Mr. King, who was examined as a witness, admitted on his cross-examination, that he did not previously prepare any bond or any formal notice of the nature of the defence, although it was in evidence, that the statute 7 & 8 Wm. 3, c. 6, which requires such steps to be taken, had been perused by Mr. M. and himself. But, a bond and notice were afterwards prepared (a).

(a) By the stat. 7 & 8 W. 3, c. 6, s. 8, it is enacted, "that where
 "any person or persons com-
 "plained of for substracting or
 "withholding any small tithes,
 "&c. shall, before the justices of
 "the peace to whom such com-
 "plaint is made, insist upon any
 "prescription, composition, or
 "*modus decimandi*, agreement,
 "or title, whereby he or she is or
 "ought to be freed from pay-
 "ment of the said tithes or other
 "dues in question, and deliver
 "the same in writing to the said
 "justices of the peace, subscrib-
 "ed by him or her, and shall then
 "give to the party complaining
 "reasonable and sufficient secu-
 "rity, to the satisfaction of the
 "said justices, to pay all such
 "costs and damages as, upon a
 "trial at law to be had for that
 "purpose in any of his Majesty's
 "Courts, having cognizance of
 "that matter, shall be given

"against him, her, or them, in
 "case the said prescription, com-
 "position, or *modus decimandi*
 "shall not, upon the said trial be
 "allowed; that in that case the
 "said justices of the peace shall
 "forbear to give any judgment
 "in the matter, and that then
 "and in such case the person
 "or persons so complaining,
 "shall and may be at liberty to
 "prosecute such person or per-
 "sons for their said substract-
 "tion, in any other court or
 "courts whatsoever; where he,
 "she, or they might have sued be-
 "fore the making of this act, any
 "thing in this act to the contra-
 "ry notwithstanding." The stat.
 53 Geo. 3, c. 127, which enlarges the jurisdiction of justices, giving them cognizance of claims to tithes not exceeding ten pounds in value, does not affect this point.

It appeared, however, that Mr. Montriou had, in his bill for the appeals, charged much less than the ordinary charges, in all the cases except that of the defendant, which was to have been heard the first; and that he had offered, under the circumstances, to make some deduction from his whole account against all the parties.

1825.
 MONTRIOU
 v.
 JEFFERINA.

Marryat for the defendant, contended, that the plaintiff was not entitled to recover, in as much as the defendant had been obliged to pay, in consequence of Mr. Montriou or his agent not having prepared the proper bond or notice under the statute, which they ought to have done, as they knew that the objection to the claim was made on the ground of a *modus*. He also argued, that a person employed in the legal as well as the medical profession, is bound to bring a reasonable degree of skill and care into the cases that he has to manage, which this plaintiff he contended had not done. The plaintiff should not have handed the parties over to another attorney, and especially to one who was the clerk to the magistrates.

ABBOTT, C. J. in his summing up, observed—According to the evidence in this case, it appears that Mr. King informed the magistrates that the defence was a *modus*, and that he was not prepared at that time to establish it. The magistrates would have adjourned the case, if the claimant would have consented; but he would not without the payment of a sum of money by the defendants, which such of them as were present did not think it right to pay. An appeal was then recommended by Mr. Montriou, but the sessions thought that they ought not to enter into it, under the circumstances. And I think nobody can doubt the propriety of their opinion; for an appeal is against the decision of a Court pronounced after a hearing, and a party is not to decline giving evidence in the first instance, and afterwards, on an appeal, produce his whole case. The question upon which the verdict will turn is, whether the

1825.
 MONTRIOU
 v.
 JEFFERIES.

expenses were incurred by the inadvertence of the plaintiff; for if he did not in the first instance give proper advice, or did not afterwards conduct the business properly, he is not entitled to recover. King says, that he and Montrion looked into the act of parliament, and were aware that under its provisions they were to inform the justices, and give security if they relied on a *modus*. And if they had done so, the jurisdiction of the justices would have been at an end, for it never could be intended by the legislature that magistrates should decide such a question, unless both parties should think fit. It does not appear that any advice was given as to the notice and security. King before the justices said, that the defendants' objection was a *modus*, and that he was not prepared to go into it, or to give in a specific account of it. It is not on this evidence made out to my mind with any degree of satisfaction, that the parties intended to give security, and withdraw the case from the consideration of the magistrates. In one of the items in the bill it is said, "we advised you *to resist* the demand on the ground of a good *modus*." It is not said to withdraw the case from the magistrates. In the bill also, the items for the bond and notice are before the 5th November, and the witness says that they were not prepared till after. The real question upon this evidence is, whether you think that the expense was brought on the parties by the inadvertence of the plaintiff? No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into: but if you think, in this case, that the plaintiff has brought all the expense on the parties by his omitting to give proper information either to them or the justices, you will, under that impression, find your verdict for the defendant.

Scarlett for the plaintiff, then elected to be

Nonsuited.

Scarlett and Storks for the plaintiff.

Marryat for the defendant.

[Attornies—*W. Montrion*, and *Stevens*.]

1825.

MONTRION
v.
JEFFERIES.

In the case of *Templer*, one, &c. v. *M'Lachlan*, 2 N. R. 136, it was laid down as clear law, that negligence cannot be set up as a defence to an action for an attorney's bill, but the party must bring an action for the negligence. However, MANSFIELD, C. J. said, "I do not go the length of saying, that in no case of this kind can negligence in the party suing be used as a defence to the action, though I think it can only be used where the negligence has been such, that the party for whom the work was done, has thereby lost all possibility of benefit from it."

In the case of *Farnsworth v. Gerrard*, 1 Camp. 38, which was an action on a *quantum meruit* by a builder; Lord ELLENBOROUGH said, "the plaintiff is to recover what he deserves. If the defendant has derived *no* benefit from his services, he deserves nothing, and there must be a verdict against him. The late Mr. Justice BULLER thought, and I in deference to so great an authority, have at times ruled the same way; that in cases of this kind, a cross action for negligence was necessary; but that if the work be done, the plaintiff must recover for it.

I have since had a conference with the judges on the subject, and I now consider this as the correct rule: That if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." And in the case of *Denew v. Daverell*, Esq. 3 Camp. 452, which was an action on a *quantum meruit* by an auctioneer. Lord ELLENBOROUGH said, that "where there is a *special* contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross action for any negligence he complains of; but when the plaintiff proceeds, as here, upon a *quantum meruit*, I have no doubt that the just value of his services may be appreciated; and that, if they are found to have been wholly abortive, he is entitled to recover no compensation. See, also, the case of *Money Penny v. Hartland* and Others, *ante*, vol. 1, p. 352, and *Hamond v. Holiday*, *ante*, vol. 1, p. 384.

1825.

Dec. 7th.

TOWNSEND *v.* CARPENTER, Gent. one, &c.

A sheriff's officer can recover caption fees, by an action against the plaintiff's attorney, who caused the warrants from the sheriff's office to be directed to him, it being proved that the master will allow the caption fee in taxing costs, and that it is always paid by the plaintiff's attorney, notwithstanding the provisions of the stat. 23 Hen. 6, c. 9.

ASSUMPSIT by the plaintiff, a sheriff's officer of the county of Surrey, against the defendant, an attorney, for 2*l.* 12*s.* 6*d.* for caption fees, for arresting several persons on writs sued out by the defendant, as attorney for different plaintiffs.

A witness from the sheriff's office produced the writs in the different cases, and the warrants granted thereon to the plaintiff to arrest the defendants named in them. It was proved by the person who produced the writs, that the defendant left them at the sheriff's office, and by other witnesses, that the plaintiff arrested the parties.

ABBOTT, C. J.—By an act of parliament, the officer is only to have a fee of 4*d.* for every arrest. Is there any authority to shew that I can direct the jury to give him more?

Chitty.—I believe, my lord, that there is no such authority to be found; but I can adduce proof that the master allows half a guinea as a caption fee, if the arrest is in town, and one guinea if out of town; and also, that it is uniformly paid to the officer by the plaintiff's attorney.

This evidence was given.

ABBOTT, C. J.—As it is proved that the master will allow the sums claimed on taxation, and that the attorney always pays them; I think the jury may find for the plaintiff.

Verdict for the plaintiff—Damages, 2*l.* 12*s.* 6*d.*

Chitty for the plaintiff.

[Attornies—*Cole*, and *Carpenter*.]

By the stat. 23 Hen. 6, c. 9, it is enacted, that “no sheriffs, under sheriffs, and officers, shall take of any person by them, or any of

them arrested or attached, any fee, &c. but such as follow, that is to say, for the sheriff twenty pence. The bailiff which maketh the arrest or attachment, four pence, and the gaoler, if the prisoner be committed to his ward, four pence."

But in the case of *Martin v. Slade*, 2 N. R. 59, which was an action against a sheriff's officer, on the stat. 32 Geo. 2, c. 28, for

taking a larger fee than allowed by law, it appeared that the officer had taken one guinea—and the Court being "clearly of opinion, that the regulations of the statute of H. 6, could not now be considered as giving the rule for the amount of the fees to be taken;" held it to be incumbent on the plaintiff to give some evidence that more had been taken than by law was allowed.

1825.
TOWNHEND
v.
CARPENTER.

BULLOCK v. LLOYD.

Dec. 10th.

THE declaration stated, that the plaintiff was the indorsee of a bill of exchange, of which the defendant was the indorser; and that, in consideration that the plaintiff would sue one Wildey, who was the acceptor, the defendant would indemnify him for the costs expended in his so doing. There was a count on the bill, and also the money counts. Plea—General issue.

It appeared, that as soon as the bill had been dishonoured, the plaintiff returned it to the defendant, who, instead of taking it up, promised to pay any costs the plaintiff might incur, if he would sue the acceptor. The plaintiff did so, and obtained a part of the amount of the bill from the acceptor, but the acceptor being taken on a *capias ad satisfaciendum* for the residue, a sum of 7*l.* 14*s.* was left due on the bill; and the plaintiff's attorney proved that the costs of that action were taxed by the master at 16*l.* 15*s.* 4*d.*

If the indorser of a dishonoured bill promise the indorsee, that if he will sue the acceptor, he (the indorser) will pay the law expenses. To entitle the indorsee to recover, on this promise, the amount of his attorney's bill on suing the acceptor, it is not necessary for him to prove that he paid the attorney, his being liable to do so is sufficient.

Lawes for the defendant, contended, that the plaintiff could not recover those costs, for there was no evidence that he had paid them to his attorney, and till he had so done, he ought not to call on the defendant to pay him.

1825.
 BULLOCK
 v.
 LLOYD.

ABBOTT, C. J.—It has been objected, that there is no proof that the plaintiff has actually paid his attorney the costs; but I do not think that is necessary; for if one at the desire of another commence an action for his benefit, the person so commencing it, is liable to the attorney for the costs; and he may, therefore, maintain an action on an indemnity like the present, although he does not shew that he has actually paid the money.

Verdict for the plaintiff for his whole claim.

Scarlett and Campbell, for the plaintiff.

Lawes for the defendant.

[Attornies—*Fitch and Mowbray*.]

Dec. 10th.

NIAS v. NICHOLSON.

If an insolvent in his schedule describe a bill of exchange as in the hands of D., that is sufficient to discharge him from his liability, although D. may have indorsed it over.

And if he state it in his schedule as drawn by himself on M., whereas it was drawn by M. on him, it will be for the jury to say, whether they are satisfied that the same bill was meant; and whether, if it was, they think the mis-description was by mistake or with intent to

mislead or deceive any one. For if they think the same bill was meant, and that the mis-description was by mistake, it is a good discharge.

ASSUMPSIT against the defendant as acceptor of a bill of exchange, drawn by one Andrew Mitchel, payable to his own order, and by him indorsed to a person named Dandridge, by whom it had been indorsed to one Wilson, who had indorsed it to the plaintiff. Pleas—1st. The general issue; and 2d. That the defendant was duly discharged under the act for the relief of insolvent debtors.

The question was, whether this bill was so described in the defendant's schedule, as to operate in his favour as a discharge from liability on it?

The defendant's schedule described certain bills thus: Three bills *drawn* by William Nicholson, on Andrew Mitchel—of the date of 23d of January, 1824, for 50*l.* each—and the schedule stated Dandridge to be the creditor on these bills.

Chitty for the defendant, argued on the authority of the

case of *Forman v. Drew*, 4 B. & C. 15, and 6 Dow. & Ry. 75, that this was a sufficient discharge under the insolvent debtors' act as to this bill. The bill was certainly stated to be in the hands of Dandridge; but, as his indorsing it over must be without the knowledge of the defendant, that description must be taken to be sufficient. It was true, that the schedule stated that this bill (with others) was drawn by Nicholson on Mitchel; whereas it was in truth drawn by Mitchel on Nicholson; but that was an evident mistake, and, therefore, ought not to prejudice the party, as it would be proved that there was no other bill which could at all answer the description of the three bills, but this and the others given with it.

1825.
NIAS
v.
NICHOLSON.

For the defendant, it was proved by Mitchel, that there had been bill transactions between Nicholson and himself, but no bill for 50*l.* drawn by Nicholson on him; and it was proved by Dandridge, that he had never had any bill drawn by Nicholson on Mitchel.

Scarlett, in reply, contended, that the jury ought to presume that, as there were bill transactions between the parties, other bills had been drawn, answering the description of the schedule.

ABBOTT, C. J. in summing up to the jury said—The insolvent debtors' act requires the debtor to present a schedule, designating the debtors against whose debts he seeks to be discharged; but as in the case of bills, they may be indorsed over without his knowledge, and therefore he may not know the actual holders, it is sufficient that he describe the bill so as to shew what bill it is, and through whom it has passed. As to the description in the schedule, it appears, that this bill corresponds in date, in amount, and in every other respect with one of the bills there described, except that in the schedule it is said to be drawn by Nicholson on Mitchel, instead of its being stated to be drawn by Mitchel on Nicholson. Under these

1825.
 NIAS
 v.
 NICHOLSON.

circumstances, I shall leave the case to you (the jury) in this way—If you think that the bill mentioned in the schedule is intended and meant for this same bill, and that the mis-description is a mistake and not intended to deceive any one, then the verdict ought to be for the defendant; but if you think that this was not the bill meant, or that if it was the bill meant, the change in the description was made to deceive or defraud any one, then the verdict should be for the plaintiff.

Verdict for the defendant.

Scarlett and Dowling, for the plaintiff.

Chitty, for the defendant.

[Attornies—*Dickenson* and *In person*.]

By the insolvent debtors' act, 1 Geo. 4, c. 119, § 6, it is enacted, that the person petitioning for his discharge under the act, shall "deliver into the said [insolvent debtors'] court, a schedule containing a full and true description of all and every person and persons to whom such prisoner shall be then indebted, or who to his or her knowledge or belief shall claim to be his or her creditors, together with the nature and amount of such" debts and claims, respectively.

In the case of *Forman and Another v. Drew* above cited, the insolvent had bought coals of the plaintiffs, who traded under the name of the "Argood Coal Company," and the debt due was 82*l.* 2*s.* 6*d.* In his schedule, he described the debt as due to Mr. Thomas

Webb, who was the agent of the plaintiffs with whom he had corresponded, and he stated the amount to be 82*l.* The Court thought that the insolvent had manifestly shewn that he intended fairly to describe the debt; and held this a sufficient compliance with the act.

And in the case of *Wood v. Jowet*, 4 B. & C. 20 (n), the Court held, that if the mis-description of the debt in the schedule was not intended to mislead, nor could have the effect of misleading, the creditor, it was sufficient.

The case of *Reeves v. Lambert*, 4 B. & C. 214, decides, that the description of a bill as in the hands of the person to whom the insolvent paid it is good, though that person had indorsed it over.

BURWOOD v. KANT.

1825.

Dec. 14th.

ASSUMPSIT against the defendant, for the plaintiff's charges as the messenger under a commission of bankrupt against John Phillips. The defendant was the petitioning creditor, and also the assignee; and the plaintiff's demand consisted of a sum of 13*l.* 2*s.* 8*d.* due to him, as messenger under the commission, before the choice of assignees, and a further sum of 7*l.* 2*s.* 6*d.* due since. As to the latter sum, no point was raised, but as to the charges due before the choice of assignees, it appeared that they had been duly allowed by the commissioners, and by them ordered to be paid out of the estate.

On this, the plaintiff's counsel argued, that if these charges were not paid out of the estate, the messenger might still recover them against the petitioning creditor.

The messenger under a commission of bankrupt, may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt, although the party was duly declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignee, out of the estate.

ABBOTT, C. J.—I have some doubt as to how far the defendant, as petitioning creditor, is liable for those charges which are due before the party was declared a bankrupt; because, when any person is so declared, those charges are to be paid out of the estate; though, if he be not declared a bankrupt, the petitioning creditor is the person liable to pay them. It very often happens that the petitioning creditor is not afterwards the assignee, and if the commissioners order these charges to be paid out of the estate, another person (the assignee) has to pay them, and they are to come out of a different fund; but there is no doubt as to the charges after the choice of assignees.

Chitty, amicus curiæ, reminded his Lordship of the case of Howard and Gibbs's bankruptcy, where 120*l.* had been recovered against the petitioning creditor, although they were declared bankrupts.

ABBOTT, C. J.—The learned counsel having removed the doubt I had entertained, a verdict may be found as

1825.
 BURWOOD
 v.
 KANT.

well for the charges which are before the choice of assignees, as those after.

Verdict for the plaintiff for the whole demand.

[Attornies—*Ashley & G.*, and *Bromley.*]

In the case of *Hartop v. Jukes*, 2 M. & S. 438, it was held, that the solicitor to a commission of bankrupt, is not in general liable to an action by the messenger for his fees; but, if he has agreed with

the petitioning creditor to work the commission for a certain sum, and has received a great part of the money, the messenger can recover against him.

Dec. 14th.

RAYNER v. LINTHORNE.

A plaintiff cannot sue another for not accepting goods, if the contract note was only signed by the plaintiff; for if the plaintiff acted as a broker, he cannot sue as a principal; and if he were a principal, his signing would not bind the defendant.

ACTION for not accepting a quantity of tallow, pursuant to contract. Plea.—The general issue.

The plaintiff was a Russia broker. A contract note signed by the plaintiff only had been delivered to the defendant—nothing was said at the time of the bargain, as to whether the parties contracted for themselves or others.

Marryat and *P. Pollock* contended, that the plaintiff ought to be nonsuited. The plaintiff either is a principal or a broker. If he is not a principal, he cannot bring the action; and if he is, no contract signed by him only will be binding on us. A seller cannot be agent for a buyer, so as to make a contract binding, within the statute of frauds. There is a case to this effect (a).

Gurney for the plaintiff.—Where the principal is not disclosed, the action may be brought by the broker in his own name. The other party may call for the principal or

(a) *Champion and Another v. Plummer*, 1 N. R. 252.

not. In this case he has not done so. He cited *Atkinson v. Amber*, 2 Esp. N. P. C. 493.

1825.
RAYNER
v.
LINTHORNE.

ABBOTT, C. J.—In the case of *Atkinson v. Amber*, the goods had been actually delivered, and there was no question upon the statute of frauds. Mr. *Marryat* puts it this way: if this is a sale, where is the note in writing signed by the defendant under that statute? I think it will not do. I should be sorry to lay down a rule which would countenance the plan of trade that has become so prevalent of selling for an unknown principal; and I think the plaintiff must be called.

Gurney.—Does your Lordship think it will make any difference if I shew that he had the goods ready for delivery.

ABBOTT, C. J.—No, certainly not.

Nonsuit.

Gurney and *Comyn*, for the plaintiff.

Marryat and *F. Pollock*, for the defendant.

[Attornies—*Thomson*, and *Cousins & H.*]

BRYAN v. WAGSTAFF.

In Error.

Dec. 15th

WRIT of error to reverse the outlawry of the plaintiff. The error assigned was, that the plaintiff in error, “before and

Practice.—If a plaintiff in a writ of error, to reverse an out-

lawry, has assigned as error, that he was beyond sea when the exigent was awarded: and the defendant in error plead, that “he left the realm of his fraud and covin, and to defeat him of his just debt, and for the pupose of avoiding the outlawry;” and on this plea issue be taken; at the trial the defendant in error begins.

If on the trial it appear that a suit was commenced against him by original, and instead of giving bail he evades the officer and goes abroad; this is evidence to induce the jury to presume that he went out of the country to avoid the outlawry, because he must be supposed to consider that if he is so sued and does not appear, an outlawry will follow. But if the proceeding against him had been by bill, it would be otherwise.

Whether the plea of the defendant in error be good in law—*Quære*, and see note, p. 129.

1825.
 }
 BRYAN
 v.
 WAGSTAFF.

at the time of the awarding and issuing the writ of *exigi facias*, upon which the said outlawry was pronounced, was in parts beyond the sea, to wit, at St. Omer, in the kingdom of France." To this there was a plea, that the plaintiff in error, "before the awarding and issuing the writ of *exigi facias*, upon which the said outlawry was pronounced, to wit, on, &c. of his fraud and covin, and in order to defeat the said Daniel Wagstaff of the means of recovering his just debt against him the said J. W. Bryan, and for the purpose of avoiding the said outlawry, when the same should be pronounced, did voluntarily leave the realm of England, and go into parts beyond the seas, and of such his fraud and covin did voluntarily stay and remain in parts beyond the seas from thence, until after the awarding and issuing the said writ of *exigi facias*, and the pronouncing of outlawry as aforesaid, and this he is ready to verify." To this plea there was a replication, that the plaintiff in error did not of his fraud and covin, &c. leave the realm, &c. (in the same terms as the plea), which concluded to the country.

As soon as the cause was called on, *Scarlett* applied to his Lordship to say, which side should begin.

ABBOTT, C. J.—I think the defendant in error should begin, because the affirmative of the question of fraud lies on him, for the fact of the plaintiff in error being actually abroad is admitted on the record.

Practice.—If a party to a cause is abroad, but employs an attorney to conduct it, he will be presumed to have left in the

To shew that the plaintiff in error went abroad to avoid proceedings against him, the counsel for the defendant in error, (who was the plaintiff in the action in which the plaintiff in error had been outlawed), called on the plain-

hands of that attorney all papers material to the cause; and therefore, if on the 13th of December, between the hours of five and six in the afternoon, notice is given to his attorney to produce a paper material to the cause, and the trial comes on on the 15th of December, this notice to produce is sufficient; and if the paper be not produced, the other party may give secondary evidence of its contents.

tiff in error, to produce a letter written to him by a clerk of the attorney for the defendant in error, dated September 6th, 1822. The notice to produce it had been served at the office of Mr. Lowe, the attorney for the plaintiff in error, on the 13th of December, between the hours of five and six. (The trial being on the 15th of December).

1825.
BRYAN
v.
WAGSTAFF.

Campbell for the plaintiff in error.—This is a notice to produce a letter sent to Mr. Bryan, in September, 1822. I can prove that he is abroad.

A witness was called, who proved that the plaintiff was at St. Omer, and had been there for two years.

ABBOTT, C. J. — When was the notice of trial given?

Campbell. — On the 9th of November last.

Scarlett. — On the question, that this is not a sufficient notice to produce; I must say, that it is the first time that a party's being abroad, was alleged to be a reason why a notice to produce was bad. In this case the party deposes his attorney to act for him, and if it were not so, a man going abroad might avoid producing any document. It is true, that at the assizes, a notice to produce given in the assize town is not sufficient; because it is to be presumed that the party who comes from the country may have left his papers at home.

Campbell, contra. — It was held in the case of a captain of a ship, that two days notice to his attorney to produce a paper was not sufficient, as the captain being on a voyage, might be reasonably supposed to have taken the paper with him. Now, this being a letter written some years ago to the plaintiff in error, it is not likely to be with the attorney, but with the client.

1825.
BRYAN
v.
WAGSTAFF.

ABBOTT, C. J.—I think that a person leaving the country and putting his case into the hands of his attorney, must be taken to leave in his attorney's hands, papers material to the cause; and this letter is most material. If it were not so, a man might, as soon as notice of trial was given, set sail for the East Indies, and the other party must then delay proceeding with his cause till his return, as it might be necessary to give him notice to produce some paper, without which it would be impossible to go on with the cause. I must hold the notice sufficient.

Secondary evidence of the letter was then given.

To shew that the plaintiff in error left the kingdom to avoid the process of outlawry—it appeared that a writ of *testatum capias* was issued against the plaintiff in error into the town of Nottingham, (near which the plaintiff in error lived), at the suit of the defendant in error. A warrant on this writ was placed in the hands of an officer, on the 28th of September, 1822. The officer could not succeed in arresting the plaintiff in error, but there was a negotiation between the attornies of the plaintiff in error and the defendant in error, relative to bail being put in—however, instead of any bail being put in, the plaintiff in error left the country, and caused all his goods to be sold on the 22d of October, in the same year. A letter of the plaintiff in error, dated October the 15th, 1822, was put in, it gave directions relative to the sale of the goods, and that letters for him should be addressed to “Mrs. Hoare, 46 Ludgate Hill,” and it appeared that he went out of the kingdom soon after. The exigent was issued on the 17th of December, 1822, and evidence was given to shew, that he left the neighbourhood of Nottingham for fear of being arrested.

Campbell, for the plaintiff in error, argued, that the question was not, whether his client left Nottingham to avoid arrests, but whether he left the kingdom to defeat

the outlawry. It was clear that he went away to avoid being arrested, but he could not go to avoid an outlawry, as no proceeding to outlawry had then been commenced; and a going away merely to avoid arrests would not support the plea pleaded. He would observe that the plea was a perfectly new one. No such was ever pleaded before, and it was contrary to a decision of the Court of Common Pleas.

1825.
BRYAN
v.
WAGSTAFF.

ABBOTT, C. J.—Whether the plea is a good one may be determined in another place (a): but what we have now

(a) In 2 Roll. Abr. 804, l. 20, it is laid down, that if a man go beyond sea of his own will, or for his pleasure, or for his private business, and *exigent* is awarded against him, and he is outlawed, he being abroad, this is error. In *Carter's* case, 2 Roll. Rep. 11, an outlawry was reversed, because the party was beyond sea at the time of the proclamation. In Litt. Ten. § 437, it is laid down, that if he which is in prison be outlawed in an action of debt or trespass, &c. he shall reverse the outlawry. But on this Lord Coke says, Co. Litt. 259 (b), “but albeit, imprisonment be a good cause to reverse an outlawry, yet it must be by process of law *in initium*, and not by consent or co-vin; for such imprisonment shall not avoid the outlawry, because upon the matter it is his own act.” But the authority bearing directly against the plea in the principal case, is the case of *Hesse v. Wood*, 4 Taunt. 691, where an outlawry was set aside upon motion, because the party was abroad at the time of the outlawry, al-

though it appeared from affidavits on the other side, that he went abroad to avoid it; and the case was said to be governed by the opinion of Lord Coke before stated: but the Court said, that they had never heard that either the going abroad or the staying abroad to avoid process, was a reason why the defendant should not reverse an outlawry when he returned.

Outlawry is now considered only as a process to compel appearance; and in general the Court will set it aside on motion, on the defendant paying the costs, and putting the plaintiff in the same situation as if there had been no outlawry.

When a party is outlawed, a special *capias utlagatum* may be sued out, directing the sheriff to summon a jury, who are to value the defendant's goods and chattels, and lands; but this does not extend to copyhold or trust property. If the jury have under valued the property, a writ of *melius inquirendum* may be sued out—and when the sheriff's return has

1825.
 BRYAN
 v.
 WAGSTAFF,

to consider is, how far this plea is supported. It has been said, that the plaintiff in error did not leave the country to avoid the outlawry, because no proceedings towards an outlawry had then taken place, but that he left the country generally to avoid his creditors. Now, if a party proceed for debt due to him, he may either commence his proceedings by bill or by original. On a proceeding by bill without an original, no outlawry could follow, and if the first proceeding on this case had been a *latitat* or bill of Middlesex, I should have thought that there was great weight in the objection of Mr. *Campbell*; but unfortunately for him, the writ in this case was a *testatum capias*. That is a proceeding by original, and a proceeding on which outlawry might follow. If it had been a proceeding by bill, it might be said, that the plaintiff in error could not have left the country to avoid an outlawry, because no outlawry could follow that mode of proceeding, and there would be great weight in that objection; but as the threatened arrest was by original, the question for you (the jury) to consider is, whether the plaintiff in error might not reasonably expect, that as his creditor (the defendant in error) had proceeded against him by original, he would follow up his proceedings by an outlawry; and if so, whether the plaintiff in error did not quit the kingdom, as well to avoid such expected outlawry as other arrests. Something has been said of an outlawry being a harsh proceeding, attended with forfeitures and disabilities; but it should be recollected, that an outlawry can always be set

been filed, a transcript is sent to the Exchequer; and out of this court a writ of *venditioni exponas* issues to sell the outlaw's goods—a *scire facias* to recover his debts, and a *levari facias* to recover the profits of his lands. Though the money so raised belongs to the Crown, if its amount does not ex-

ceed 50*l.* it will be paid to the plaintiff, by order of the Court of Exchequer, on motion. If it exceeds that sum, it can be obtained by the plaintiff on petition to the lords of the treasury. For the necessary steps to be taken on such petition, see Tidd, Prac. 136, and the forms there referred to.

aside on the party doing what is fair, and the king's rights on the outlawry are all instantly waived.

1825.
BRYAN
v.
WAGSTAFF.

The jury thought that the plaintiff in error did leave the kingdom to avoid the outlawry, as well as to avoid being arrested, and found a verdict for the defendant in error.

Campbell and *Putieson*, for the plaintiff in error.

Scarlett and *Chitty*, for the defendant in error.

[Attornies—*J. H. Lowe*, and *G. T. & R. Taylor*.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JS.
In Bank.

Campbell now moved for a new trial, on the ground that there was no direct evidence that the plaintiff in error knew, at the time he left the kingdom, that any proceedings to outlawry were about to be had against him.

Jan. 26th.

BAYLEY, J.—He must be taken to expect that the ordinary consequences of not appearing in a suit by original would follow.

Campbell.—But as no outlawry process had issued, he could not have gone away to avoid it.

ABBOTT, C.J.—Was it not a question for the jury?

Campbell.—My Lord, I cannot complain of the way in which the case was left to the jury.

ABBOTT, C. J.—Have you any other argument?

1825.
 BRYAN
 v.
 WAGSTAFF.

Campbell then moved to enter up judgment *non obstante veredicto*, on the ground that if a party be outlawed, and is beyond sea at the time when the *exigent* is issued, it is error; and that the fact of its being for the purpose of avoiding the outlawry, made no difference. He cited the stat. 26 H. 8, c. 13. 5 & 6 E. 6, c. 11. and 2 Roll. Abr. 804, l. 20. *Mathews v. Erbo*, 1 Ld. Ray. 349. *Hesse v. Wood*, 4 Taunt. 691. Co. Litt. 259 (b). *Serocold v. Hampsey*, 12 East, 624 (n). 1 Wils. 3. and *Graham v. Henry*, 1 B. & A. 131.

ABBOTT, C. J.—Your motion should not be why judgment should not be entered up *non obstante veredicto*, but why the judgment of outlawry should not be reversed.

The Court granted a rule *nisi* accordingly.

Dec. 16th.

RIPLEY and Another v. SCAIFE.

By a charter-party on a voyage from Liverpool to the West Indies, and from thence to London or Liverpool, it is agreed that a brig "shall be made, and during the voyage kept tight, staunch, &c. at the owner's expense, and that the freighter shall pay freight at the rate of 200*l.* per month for any time (beyond six months), that she may be employed; the pay to commence

MONEY had and received. Plea.—General issue.

The action was brought to recover back 184*l.* 2*s.* paid by the plaintiffs to the defendant, who was part owner of the brig Alliance. This sum was paid by the plaintiffs (under protest) as freight, at the rate of 200*l.* per month, for twenty-eight days, during which the brig was at St. Domingo, and which was alleged to be due on a charter-party, dated June 21st, 1821, by which it was agreed between the defendant, as part owner of the brig Alliance, and the plaintiffs, "that the said brig or vessel shall at the owner's expense be made, and during the voyage shall be kept tight, staunch, and strong, and well found and provided with all things necessary; and shall with all convenient speed be made ready, and receive at Liverpool a car-

from the day of sailing until her arrival into dock at the homeward port of discharge." The vessel was obliged to remain twenty-eight days at St. Domingo for the purposes of repair, the repairs being done at the expense of the owner.

Held, that during those twenty-eight days, the vessel was employed by the freighter within the terms of this charter-party.

go, and proceed to St. Thomas and deliver cargo, &c. and thence proceed to the island of St. Domingo, as the freighters might direct," &c. (It then proceeded to stipulate for a homeward voyage to Liverpool or London). "And the freighters agree, that they, their executors, &c. will pay or cause to be paid to the owners of the said brig, their executors, &c. for the freight of the said vessel, at and after the following rate, namely, the sum of 200*l.* British sterling, *per* month, for six months certain, and so in proportion for any longer time *that she may be employed; the said pay to commence from the 25th day of July next ensuing; or should the vessel sail from Liverpool before that day, then the pay to commence from the day of sailing until her arrival into dock, at the homeward port of discharge."*

1825.
 RIPLEY
 v.
 SCAIFE.

The brig proceeded on her voyage, and having got on shore at St. Domingo, she was there necessarily detained twenty-eight days, for the purpose of repairing, and finally arrived in Liverpool on the 12th of March, 1822.

The defendant (the owner) was at the expense of the repairs at St. Domingo, and claimed to be paid freight for the twenty-eight days the vessel was under repair at St. Domingo. The sum for those twenty-eight days, being 184*l.* 2*s.*, was paid by the plaintiffs under protest, for the purpose of obtaining the cargo, and the present action was brought to recover back that sum.

(The other parts of the case to which the other counts of the declaration were applicable, did not involve any point of law).

The plaintiffs' counsel, on these facts, contended, that the brig, while under repair, could not be considered as *employed* by the freighters; and, therefore, that this sum was not due for freight.

ABBOTT, C. J. — I am of opinion that the construction of the charter-party is with the defendant; and that, for the purpose of this charter-party, the ship must be consi-

1825.
 RIPLEY
 v.
 SCARLETT.

dered as having been employed during the twenty-eight days by the plaintiffs, the freighters.

Verdict for the defendant.

Scarlett and *F. Pollock*, for the plaintiffs.

The Attorney-General and *Campbell*, for the defendant.

[Attornies—*Reardon & D.*, and *Bowman*.]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITTLEDALE, JS.
 In Bank.

Jan. 26th.

Scarlett now moved for a rule nisi for a new trial, on the ground of mis-direction of the Lord Chief Justice, but the Court concurring in the opinion given by his Lordship at the trial, refused the rule.

Dec. 16th.

DOE, on the demise of BARRAUD, Assignee of HAYWARD, a Bankrupt, v. LAWRENCE.

A party, to become bankrupt, must be a trader at the time of the petitioning creditor's debt; but, if that was contracted while he was a trader, and he leave off trade, he may still become a bankrupt.

If one procure orders for goods, having no stock, but buying them from those who have, he making out bills to his customers in his own name, and being himself debited by the

EJECTMENT to recover two houses in Bread-street, London. The title to one of the houses was not made out; but the question made was as to the bankruptcy. The commission of bankrupt was dated April 8th, 1823. The petitioning creditor's debt was bills, dated December 2nd, 1822, and accepted by the bankrupt.

Scarlett objected, that, to make this a good petitioning creditor's debt, there ought to be evidence that the bankrupt actually accepted these bills before the bankruptcy.

A witness was then called, who proved that he saw the bills with the bankrupt's acceptance on them, within a few days after the time at which they bore date.

person he buys of, this is a trading within the bankrupt laws; but if he procure orders for another, and is by that other person paid a commission, the other person sending the goods to the customers, this was not a trading within the bankrupt laws, antecedent to the stat 6 Geo. 4, c. 16.

The act of bankruptcy was in January, 1823. The bankrupt was by business a land surveyor; and the trading relied on was, that, during the year 1822, the bankrupt got orders for coals from different persons, and that he sold the coals to them with invoices in his own name, he having ordered these coals of the petitioning creditor, from time to time, as he himself got orders for them; but it appeared that the bankrupt had neither wharfs, lighters, nor carts.

1825.
Doe
v.
Lawrence.

Scarlett, for the defendant, contended, that this evidence did not prove a trading at the time of the petitioning creditor's debt; and further, that this was not a trading in coals, as the bankrupt was really only an agent of the coal-merchant, and not a dealer in coals himself.

ABBOTT, C. J.—The authorities, I think, go to this:—a party, to become bankrupt, must be a trader at the time of the petitioning creditor's debt; but, if the petitioning creditor's debt accrue during the trading, and the party leave off trade, and then commit an act of bankruptcy, the petitioning creditor may still sue out a commission of bankruptcy against him, notwithstanding he has retired from trade. As to the other point, the single question is, whether the bankrupt was a trader at the time of the petitioning creditor's debt. I have learned in this place, that there are many dealers in coals, who have no wharfs, carts, &c., but get orders from persons, and then order the coals from another person, who has wharfs, &c., the middle person being debited by the real merchant, and in return debiting those who consume them. There is no doubt but this is a buying and selling within the bankrupt laws in the middle man. But there are also other persons who get orders for coal merchants, and who, in fact, are not debited for the coals, but receive a commission from the coal merchant for the orders they get; and the coal merchant supplies the customer with the coals. This latter is not a trading within

1825.
 {
 DOE
 v.
 LAWRENCE.

the meaning of the bankrupt laws existing at the time of these transactions (a). Which of these two capacities the bankrupt acted in, is material for your (the jury's) consideration; but the petitioning creditor's debt, being for a very large quantity of coals sold to the bankrupt, affords some presumption that he bought coals to sell to others; for if he only got orders, and was to receive a commission, the petitioning creditor would have been debtor to the bankrupt.

Verdict for the lessor of the plaintiff for one of the houses.

Gurney and Chitty, for the lessor of the plaintiff.

Scarlett and F. Pollock, for the defendant.

[Attornies—*Grimaldi & S.* and *Green & A.*]

(a) The sixth section of the last bankrupt act, 6 Geo. 4, c. 16, makes some persons liable to the operation of the bankrupt laws, who were not so before; as it enacts “that all bankers, brokers, and persons, using the trade or profession of a scrivener, receiving other men's monies or estates into their trust or custody; and persons insuring ships or their freight, or other matter, against perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victualers, keepers of inns, taverns, hotels or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen, and all persons using the trade of merchandise by way of bargain-

ing, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting on hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt. Provided that no farmer, grazier, common labourer, or workman, for hire, receiver-general of the taxes, or member of, or subscriber to, any incorporated, commercial, or trading companies, established by charter or act of parliament, shall be deemed as such a trader, liable, by virtue of this act, to become bankrupt.”

BRADFORD v. LEVY.

1825.

Dec. 17th.

ASSUMPSIT upon a policy of insurance on the ship *Dove*, bound from Labrador to Oporto, for an average loss. The loss was stated in the first and second counts, to be by the ship being detained against the will of the owners, and master, and mariners, in the port of Vigo, by divers custom-house officers, and certain other persons then acting under the authority of the king of Spain; in other counts, by perils of the seas, and in the others by barratry.

It appeared, that in October, 1822, the ship sailed on this voyage with a cargo of fish, and, in consequence of bad weather, was obliged to put into the port of Corcubion in Spain. The master then went on shore to make out his manifest; and there a mistake was made in the manifest by the omission of seventy quintals of fish, which belonged to the master himself. This was discovered, and a new manifest made out, the former manifest being transmitted to Vigo by the Spanish authorities: the ship proceeded on her voyage, and on the 13th of February, 1819, having sprung a leak, she put into Vigo, and there, from the circumstance of the two manifests being different, the authorities there suspected that he had surreptitiously landed a part of his cargo; and proceedings were commenced in the court of the first instance, at Vigo, against the captain, on a charge of having surreptitiously landed a part of his cargo: in this suit the captain was condemned; and, in consequence of this, the ship was delayed there from the 15th of February to the 6th of August, 1823; and, by reason of the sentence against the captain, 200*l.* worth of the fish was seized; but the proceedings were not at all against the ship, but only against the captain personally. This was shewn by an examined copy of the decree of that court, which his Lordship held to be evidence to shew what the nature of the proceeding was.

If by some mistake of a ship's manifest, a suit is commenced in a foreign port against the captain for a supposed surreptitious landing of a part of his cargo, by which he is delayed in prosecuting his voyage, there being no suit against the ship. This is not a loss for which the underwriters on the ship are liable.

ABBOTT, C. J. — The case appears to me to stand thus:—

1825.
BRADFORD
v.
LEVY.

In consequence of a mistake in the manifest, the officers at Vigo suspected that the captain had landed a part of his cargo surreptitiously: and a suit is commenced against him, and he is condemned to pay a sum of money. Now, how can this be a loss to affect the underwriters on the ship? I cannot infer fraud in the master without proof; and there was no suit against the ship.

Abraham cited *Carruthers v. Gray*, 3 Camp. 142.

ABBOTT, C. J. — There the ship was arrested, and here she was not; which I think makes the whole difference.

Nonsuit.

Marryat and *Abraham*, for the plaintiff.

Scarlett and *F. Pollock*, for the defendant.

[Attornies—*H. & E. Willoughby*, and *J. & S. Pearce*.]

The case of *Carruthers v. Gray*, 3 Camp. 142, was an action on a policy of insurance on goods; and the declaration averred, that the ship with the goods on board, when at Cronstadt, was arrested by the persons exercising the powers of government there, and the goods were then and there, by the said persons seized, detained, and confiscated. The goods, it appeared, were seized by the officers of government there, and never reached the consignor. It was objected, that it

was necessary, in support of this averment, to prove that the goods had been confiscated, and to put in a sentence of condemnation. Lord ELLENBOROUGH said, that literally, to show confiscation, it would be necessary to prove that the proceeds of the goods came to the treasury of the state; but held that the averment was sufficiently sustained by proof that the goods were forcibly taken possession of by the officers of government.

Dec. 17th.

LLOYD v. ASHBY and Others.

Held, that the indorsee, for value of a bill of exchange, cannot maintain an action on a bill accepted by one partner, in a transaction not relating to the partnership, against a secret partner; because such secret partner had neither privity of interest in the bill, not being accepted in a partnership transaction; nor was the bill taken on his credit, as he was not known to be a partner.

ASSUMPSIT against the defendants Ashby, Shaw, and Howell Rowland, on a bill of exchange, dated July 28th, 1824, for 82l. 12s. drawn by Hugh Rowland, and ad-

tion on a bill accepted by one partner, in a transaction not relating to the partnership, against a secret partner; because such secret partner had neither privity of interest in the bill, not being accepted in a partnership transaction; nor was the bill taken on his credit, as he was not known to be a partner.

drawn "Messrs. Ashby & Co." at three months after date, and payable to the drawer, who had indorsed it to the order of the plaintiff. The acceptance on it was "Ashby and Rowland," and was in the handwriting of Howell Rowland, who was the son of the drawer. Howell Rowland had suffered judgment to go by default; and the other defendants pleaded the general issue.

The real question to be tried was, whether Mr. Shaw, who was a dormant partner, was liable on this acceptance. To shew him to be a partner with the other defendants, an agreement, dated the 24th of June, 1824, between Ashby and Rowland on the one part, and Shaw on the other, was put in; by which it was agreed that Mr. Shaw was to become a partner, and to bring 1500*l.* into the concern, but that his name should not appear in the firm, but only those of Ashby and Rowland. It was also proved, that the fact of his being a partner was not made known, nor was his name used at all in the transactions of the firm. Mr. Hugh Rowland, the drawer of the bill, had had dealings with a former firm, while Mr. Osborne was a partner in it, (that firm having traded under the name of Ashby & Co.), and of that firm Ashby and Howell Rowland had agreed to pay the debts; but there had been no dealings of any kind between him and the defendants at any time since Mr. Shaw had become a partner. The plaintiff had taken the bill of the drawer in payment of the price of a steam engine that he had purchased of him, the plaintiff having agreed, before he delivered the steam engine, to take the acceptance of Ashby & Co. in payment, he having, on enquiry, understood it to be a good firm.

Scarlett, for the defendant Shaw.—I submit that Mr. Shaw is not liable on this acceptance: he was a sleeping partner, and had advanced 1500*l.*; but his name was neither used, nor even known. I admit that he was liable for the debts of the house; but a dormant partner cannot be bound by transactions not belonging to the firm: he is

1825.
LLOYD
v.
ASHBY.

1825.
LLOYD
v.
ASHBY.

only bound on a partnership transaction, he being liable in respect of interest; but if young Mr. Rowland wanted to raise money for his own purposes, Mr. Shaw would not be liable, because he had no interest in the transaction; and he would not be liable in respect of credit being given to him as a partner; because it was unknown that he was so. The drawer of the bill never dealt with the firm after Mr. Osborne went out, but, having money due to him from "Ashby and Co.," he draws a bill for his debt, and Howell Rowland accepts it. If a man receives a bill from a partnership for a debt due from one or more of the partners, he would not recover against the whole firm; and therefore if Mr. Rowland, senr. had sued, even knowing Mr. Shaw to be a partner, he could not have recovered against him, there being no contract between Shaw and the drawer; and the drawing of a bill in favour of an individual, only transfers the debt to him. And all that was assigned to the plaintiff was the debt due from Ashby and Rowland, junr. to Rowland, senr. If the plaintiff, being the indorsee, had known Shaw to be a partner, and had taken the bill on his credit, I know that Shaw could not have repudiated the transaction; but the plaintiff did not take it on his credit, for he did not know that Shaw was a partner; and if he did not take the bill on Shaw's credit, he only took an assignment of the debt which was due to the drawer. If a stranger to the concern, like the plaintiff, takes the debt of another man, he can only take what that man can give him. This bill is accepted "Ashby & Rowland," but it was for a debt of Ashby & Co. A dormant partner may say he was not interested in the transaction; and, if the plaintiff had asked who "Ashby & Co." were, he would have been told Ashby, Rowland, & Osborne; and its being accepted "Ashby & Rowland," makes no difference, as it was only to pay the old debt. The question therefore is, whether a dormant partner shall be liable when his name is not used, and

when the acceptance is given for a debt due before he was a partner.

1825.
 LLOYD
 v.
 ASHBY.

ABBOTT, C. J. — If you show that it was given for an old debt, the case of *Shireff v. Wilkes*, 1 East, 48, is an authority in your favour.

Scarlett. — The question then would come to this:— would an acceptance bind a dormant partner, if it were to raise money for the private accommodation of one of the partners? It is proved that Shaw was never a debtor to Rowland, senr.; and therefore he had no right to draw a bill on Shaw, unless the latter had lent his credit, which he has not done. If there were no debt at all, and the money was raised, not for the firm, but for the private accommodation of one of the partners, the dormant partner would not be liable. If A. and B. go to a banker's, and give him their draft for the purpose of raising money, the banker can recover against both; and if C. is a dormant partner, and the money was raised for the firm, C. will be also liable; but if the money was not raised for the firm, C. would not be liable; for I submit that a partner can only be bound by lending his credit, or by privity of interest.

Marryat for the plaintiff. — The case of *Shireff v. Wilkes*, was that of a person who knew for what the bill was drawn; but no case has decided that a *bonâ fide* holder of a bill, who does not know whether it was given for an old debt, or for a debt of the new firm, or for accommodation, is prevented from recovering on it against all the partners, dormant or otherwise. I submit, that it would bind those who were partners at the time of the accepting of the bill. In the case of *Swan v. Heald*, 7 Ea. 210, where two partners indorsed a bill for goods purchased by them in one trade, and all the partners who traded with them in another were held liable, although one was a dormant partner.

1825.
LLOYD
v.
ASHBY.

Scarlett.—That case only decides that, being assets of the firm, one partner might pass it away.

Marryat.—In the case of *Ridley v. Taylor*, 13 Ea. 175, it was held, that if one partner draw in the name of the firm, it will bind all the partners; although the bill be passed away by one partner in discharge of his own separate debt, unless there be covin proved to exist between that partner and the separate creditor. And I take it, that whenever a bill has got into the hands of an indorsee for value, he may recover on it, although the drawer could not; because the drawer knows for what debt he took it, and he knows what partner he ought to draw on; and a distinction has always been taken between the case of a drawer, and that of a *bond fide* holder, who is not guilty of covin, and who does not know of any party but the drawer.

ABBOTT, C. J.—Was the case of *Ridley v. Taylor*, the case of an unknown partner?

Stephen.—It was not, my Lord.

ABBOTT, C. J.—I must take it, on the evidence, that this bill was accepted either for a debt due before Mr. Shaw became a partner, or for the accommodation of others. If Shaw had been known to be a partner, I should have held that it was taken on his credit; and that, unless there was fraud in the plaintiff, he would be entitled to recover on it against Shaw: but as the plaintiff did not know that Shaw was a partner, and as he could not have taken the bill on Shaw's credit, I am of opinion that the plaintiff cannot recover. I ground myself on these circumstances, that Mr. Shaw was an unknown partner, and that the bill was not accepted for a debt from him, but for the raising of money from which he had no benefit.

Nonsuit.

Marryat and *Stephen*, for the plaintiff.

Scarlett, *Gurney*, and *Tindal*, for the defendant *Shaw*.

[Attornies—*Collins*, and *Sweet & Co.*]

1825.
LLOYD
v.
ASHBY.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.
In Bank.

Marryat now moved for a rule *nisi* for a new trial, and argued, that, however, the drawer could not have recovered against Mr. Shaw on this bill, yet a *bond fide* holder for value might do so. As the plaintiff was not guilty of collusion, he could have recovered against Mr. Shaw, if he had been an ostensible partner, whether the bill had been accepted for a partnership transaction or not. This person, it is true, was a dormant partner; but he had never yet heard that a dormant partner when discovered, was different in point of liability from any other partner.

Jan. 26th.

BAYLEY, J.—But this is not a partnership transaction.—In all partnership transactions, a dormant partner is liable, no doubt.

Marryat.—If I agree to sell goods to A. B., and he is to pay me by the acceptance of C. D., and I deliver the goods and get the acceptance, I am not to inquire whether C. D. got value for the acceptance.

BAYLEY, J.—Then you would have taken the bill on the credit of that person.

Marryat.—But would it not be considered that the bill was taken generally on the credit of the firm, whoever it might consist of. If a man take the acceptance of Messrs. Child & Co. the bankers, there is no doubt, that although there is now in that firm no person of the name of Child,

1825.
 LLOYD
 v.
 ASHBY.

all the partners of the house would be liable on it, although most, if not all of them, were unknown at the time of the taking of the bill.

ABBOTT, C. J. — This is, no doubt, a case of great importance: you may therefore take a

Rule to shew cause.

Dec. 21st.

WOOLEY and Others, Assignees of DOWMAN and OFFLEY, Bankrupts, v. JENNINGS and Another.

If A. owe B. a sum of money, *e. g.* 4000*l.* and give a warrant of attorney to confess judgment for that sum; and after that dealings and payments take place between them to an amount of 20,000*l.* on each side of the account, but no payment is made specifically in discharge of the warrant of attorney; the creditor may enforce it, though subsequently to its date he received a larger sum than it was given; for, if the money was not specifically paid in discharge of the warrant of attorney, the creditor might put it in reduction of which of the two accounts he chose.

TROVER for goods and bills of exchange. Plea — General issue.

It appeared that the bankrupts and the defendants having had considerable dealings, and a balance of about 4000*l.* being due to the defendants, the bankrupts, on the 20th of January, 1823, gave a warrant of attorney to confess a judgment to the defendants. This warrant of attorney was endorsed:—

“ The within warrant of attorney was given to secure the sum of 4000*l.*, with lawful interest thereon.”

By a statement of the accounts between the bankrupts and the defendants, which statement was partly in the handwriting of one of the defendants, and contained the whole of their dealings up to September 22nd, 1823, it appeared that payments had been made by the bankrupts between the date of the warrant of attorney and the time of the making up of the account, to an amount of near 20,000*l.*, but that there were dealings on the other side of the account to near the same amount; and no mention was made of the warrant of attorney. On the face of this statement, a balance of 2409*l.* 4*s.* 9*d.* appeared to be due to the defendants, ex-

clusive of any sum that might be due on the warrant of attorney. On the 4th of October, 1823, a writ of *fieri facias* was sued out by the defendants against the bankrupts, on the warrant of attorney; and on the 29th October the commission of bankrupt issued. The question therefore was, whether the warrant of attorney had been satisfied by the payments that had been made.

1825.
 WOOLLEY
 v.
 JENNINGS.

ABBOTT, C. J.—It appears, by this account, that sums very much exceeding 4000*l.* were paid after the warrant of attorney was given, but that there is nearly as much on the other side of the account. On this, the assignees contend, that as soon as a sum of 4000*l.* was paid, there was an end of the warrant of attorney, it being satisfied. Now, can you, Mr. *Attorney-General*, adduce any evidence that any payment was made specifically to reduce this warrant of attorney.

The *Attorney-General*.—I cannot, my Lord.

ABBOTT, C. J.—Then I think that this falls within the general rule of law. The payments were made generally; and the receiver put them to the current account. There is no appropriation of the money by the debtor: he leaves it to the creditor to put it in reduction of either debt, and the creditor appropriates it to the running account.

F. Pollock.—The question intended to be raised is, whether there can be a running security given by a trader for his creditor to have immediate execution for debts that became due afterwards.

ABBOTT, C. J.—I am not called upon to decide that abstract proposition.

The *Attorney-General*.—They took too much under the execution; as it appears that the real balance was 2409*l.* 4*s.* 9*d.*, and they levied for 4000*l.*

1825.
 WOOLEY
 v.
 JENNINGS.

ABBOTT, C. J.—If they had a right to sue out execution at all, trover is not the proper remedy for their taking too much.

Verdict for the defendant.

The *Attorney-General, Gurney, Taunton, and F. Pollock*, for the plaintiffs,

Scarlett and Marryat, for the defendants.

[Attornies—*J. James, and T. Jones.*]

WHITTINGTON v. GLADWIN.

Action lies against a person for saying of an *inn and tavern keeper*, “you are a pauper, and will be in the bankrupt list in less than twelve months;” and it is not necessary, to support an action for words spoken of a man in his trade, that his trade should be averred in the declaration to be such an one as will make him liable to the bankrupt laws; and proof at the trial that he has once sold spirits to be consumed out of his house, is sufficient proof of his being a trader.

SLANDER.—The declaration stated, that the plaintiff, before and at the time of the committing of the grievances complained of, had been, and that he still was, an *inn and tavern kepeer*, and had always exercised, &c., and still did exercise, &c., the same *trade or business* with great integrity, &c., and that the defendant, wickedly and maliciously intending to injure him in his good name, fame, and credit, and also to injure him in his said trade or business, in a certain discourse, &c. spoke these words:—“You are a pauper: you will be in the bankrupt list in less than twelve months.” Plea—General issue. The words were addressed to the plaintiff, in the coffee-room of his own house, and in the presence of several of his neighbours.

One of the witnesses, who proved the speaking of the words, proved also that the plaintiff had sold him a quantity of spirits, to be consumed out of the house:

ABBOTT, C. J. ruled, that such proof was quite sufficient to shew that the plaintiff was a trader liable to the bankrupt laws. His Lordship left the case to the jury, who returned a

Verdict for the plaintiff.—Damages, 10*l*.

Scarlett, Brougham, and Payne, for the plaintiff.

Marryat, and Ludlow, for the defendant.

[Attornies—*Whittington, and Berkeleys.*]

In the ensuing Hilary Term, *Marryat* moved for a rule to shew cause why the judgment should not be arrested, on the ground that the averment in the declaration, that the plaintiff was an inn and tavern keeper, was insufficient, as he was not, in either of those capacities, subject to the then bankrupt laws; and the words spoken not being actionable in themselves. It had always been understood, that words importing insolvency, spoken of a man not liable to the bankrupt laws, would not support an action. "To call a man bankrupt generally, no action will lie upon it." 1 Viner's Abridgment, 475. He must carry on trade by buying and selling. And in a case in *Siderfin*, 299, judgment was arrested, because it was not averred that the plaintiff got his living by buying and selling. He cited, also, an Anonymous case in *Bulst.* 40; and *Collis v. Malin*, Cro. Car. 282 (a).

1825.

Warrington

v.
GLADWIN.

ABBOTT, C. J.—It does not appear to me that the latter case is any authority for the distinction you seek to establish between the case of a man liable to the bankrupt laws, and one who is not so; because, it seems that the plaintiff there was not in any trade at all at the time when the words were spoken. The single question is, whether such words as those complained of, spoken of a man buying liquors and other articles for the entertainment of his customers, may not prejudice him, although he is not liable to the laws respecting bankrupts? May not such a man be as much injured as if he were so liable? According to

(a) "Trin. 8 Car. Action for words.—Whereas the plaintiff had used, *per magnum tempus*, the trade of buying and selling of cattle, and divers times bought upon his credit: that the defendant said of him, *Thou art a bankrupt*: the defendant pleaded Not Guilty, and found against him; and because he did not

"say, that he used the trade at the time of the words speaking, but *per magnum tempus usus fuit*, which may be divers years before: and the action lies not; unless, at the time of speaking the words, he used the trade of buying and selling of cattle: therefore it was adjudged for the defendant."

1825. all the principles upon which actions for words are found-
 WHITTINGTON ed, I am of opinion that he may.

v.
 GLADWIN.

BAYLEY, J.—On what principle is it that an attorney may bring an action for words charging him with negligence in his profession: is it not this, that it may prevent his being employed? And so an innkeeper may be injured, if you say of him that he is a pauper. Does not saying a man is a pauper import insolvency? You would not go to a pauper's house to get entertainment: you would not expect at the house of such a man to meet with those things which an innkeeper is bound to supply. Whatever hurts a man in his business is actionable. There is a case on the subject, 1 Lord Raymond, 610 (b); and it did not appear there that the plaintiff was getting his living by buying and selling.

HOLROYD and LITTLEDALE, Js. concurred.

Rule refused.

(b) *Read v. Hudson*. The plaintiff was a laceman: and the question raised there was, whether the action was maintainable for the words as spoken of him in his trade, as the declaration stated them to be spoken "*de statu suo*," instead of being "*arte vel misterio*;" and the Court thought it sufficient.

Dec. 23rd.

HANNAFORD v. HUNN, Esq.

Action for false imprisonment brought by a master of a man of war, against his captain. The defendant plead-

FALSE imprisonment.—The first count of the declaration stated that the defendant, on the 14th of August, 1824, assaulted the plaintiff on board of a certain ship, called

The first set stated, that he imprisoned the plaintiff in order to bring him to a court martial for disobedience of his orders, quarrelling, &c. The second set stated, that the imprisonment took place in consequence of charges brought against the plaintiff by a superior officer.

The sentence of a court-martial, held to investigate the charges, cannot be received as conclusive evidence on this state of the pleadings, but, to make it so, should be pleaded as an estoppel; and it is open to the jury, if they believe that the imprisonment took place on the charges stated in the first set of pleas, to inquire into the truth of those charges, notwithstanding the decision of the court martial upon them.

the Tweed, and compelled him to enter a certain small and confined cabin, or room, and there kept him imprisoned, without any reasonable or probable cause, for the space of three days, whereby he suffered much, and was injured greatly in credit, health, &c. There were other counts, charging other similar imprisonments; but the only imprisonments upon which evidence was given were—that stated in the first count, and another, which followed an arrest on the 31st day of August.

1825.
HANNAFORD
v.
HUNN.

The defendant pleaded, 1st, the general issue; 2d, that, at the time of the assault, &c. complained of in the first count, he was captain and commander of the Tweed, which was a ship of war, and that the plaintiff, being a person belonging to the fleet, and subject to his command as his superior officer, “did wilfully and unlawfully refuse to obey, and did wilfully and unlawfully disobey a certain lawful command, before then given by him as such officer,” contrary to his duty, and in breach of good order and the discipline of the navy, &c.; in consequence of which he, the defendant, put him under arrest, “in order that he might be brought, and until he should be brought, to trial by a court-martial” for his offence.

3rd. The defendant pleaded that the cause of the arrest was disobedience by the plaintiff to an order issued by a certain superior officer.

4th. That the plaintiff, *having quarrelled* with a certain superior officer, defendant caused him to be imprisoned.

5th. That the plaintiff had *behaved with contempt* to the defendant.

6th. That he had behaved with contempt to a certain superior officer.

7th. That he *had used reproachful and provoking speech and gestures* to a certain other person, tending to make a quarrel and disturbance.

8th. That he *had made in the log-book an undue, improper, and unauthorised entry*.

9th. That he had been guilty of *falsehood and prevarication*.

1825.
 HANNAFORD
 v.
 HUNT.

10th. That he had been guilty of *an offence* against the articles and orders for the better regulation of the navy, *cognizable by a court-martial*, but not stating what the offence was.

There was a similar set of pleas to each of the other counts in the declaration. The rest of the pleas stated, in substance, that the defendant arrested the plaintiff in order to bring him to a court-martial, *in consequence of certain complaints, charges, and accusations* made to the defendant against the plaintiff (for certain offences therein specified) *by a superior officer* of the plaintiff's. The plaintiff replied, "*de injuria sua propria*," and new assigned excess. The defendant rejoined, "Not guilty," to the new assignment, and joined issue upon the replication.

The plaintiff was master, and the defendant captain of a ship of war called the Tweed. It appeared, that, on the 13th August, 1824, the vessel being then at Bahia, the defendant directed the plaintiff to sign a set of orders which he had made for the management of the ship's crew, particularly referring him to Order 30. The plaintiff, conceiving that some of them were at variance with the printed instructions, which are issued for the regulation of the navy in general, did not feel justified in obeying the defendant's direction, without first remonstrating, which he did by letter in the following terms:—

" His Majesty's Ship, Tweed, Bahia.
 August 14th, 1824.

" Sir,—In compliance with your directions, through the senior lieutenant, desiring me to peruse the 30th article of your orders issued yesterday, I most respectfully beg to inform you, that I have complied with that order; and I find, upon strict perusal of the 30th order, you refer me to the general printed naval instructions; and, having so done, I find in them nothing to warrant my signing the articles (Numbers 14, 21, and 30) contained in your order-book; and, in corroboration of my statement, I beg

leave to refer you to the articles, Numbers 7, 9, and 15 of sect. 1, chap. 1, of general printed naval instructions.

I am, &c.

(Signed) G. Hannaford."

1825.
HANNAFORD
v.
HUNN.

Shortly after the receipt of this letter by the defendant, the first arrest complained of took place in the presence of the whole ship's company, the defendant reading and observing on the letter written by the plaintiff, and also the articles of war, in a violent and passionate manner. It appeared that, before this time, there had been some disputes between the plaintiff and Lieutenant Kelly, respecting which Lieutenant Kelly had addressed a letter to the defendant. The first arrest lasted three days, and ended on the 17th of August; from which time, till the 31st, the plaintiff continued to discharge his duties as master. On the 31st he was again placed under arrest. The crew were present on the quarter-deck, and the defendant put the order-book into the plaintiff's hand, and told him to go down and sign it. The plaintiff took the book and went down; and, when he returned, he gave the book, signed, to the captain, accompanying the act with a remonstrance against the effect of some of the orders. This second imprisonment lasted 41 days. At the time of this arrest, the plaintiff was accused by the defendant of falsehood and prevarication, and also of having made some improper alterations in the log-book, varying from the contents of the log-board; but the lieutenant of the watch proved that the alterations accorded with the facts, and that they were made by his direction (a).

(a) Section 6, Chap. 2, Art. 32, p. 193, of the printed naval instructions, under the head of master, after stating the duty of the master to make entries in the log-book from the log-board; and also of the lieutenants to sign the entries, goes on to say, "after

the log-book has been signed by the lieutenants, no alteration, however trifling, is to be made in it, without the approbation of the captain, and the perfect recollection of the lieutenant of the watch, that such alteration is proper."

1825.
HANNAFORD
v.
HUNN.

It appeared also, that the captain had told the plaintiff that he might make what alterations he pleased in the log-book. The arrest, during great part of the time, was what is called close.

The orders of the defendant, particularly referred to in the plaintiff's letter, and which were given in evidence, were as follow:—

“14th. It having frequently occurred, that serious and unfortunate disputes have arisen between the ships who have embarked specie and the shippers thereof, in consequence of not adopting a cautious and official mode in so doing; it is my direction that the master attend and pay most particular attention to this branch of his duty; and whenever any treasure be brought on board, that he, with the officers of the watch, and the purser, attend in my fore cabin, and there count out every box, or bag, dollar, and coin so received, which he shall describe by number, mark, and contents in the log-book, signed by the officers of the watch; and having so counted and re-packed all such treasures, he is to pay most particular attention to its stowage in such place as shall be pointed out by the commanding officer, and not leave the place until safely and securely lodged, which he is to report to me if on board, or the first lieutenant in my absence.”

21st. “Whenever any officer may be desirous of making any official communication with the commander in chief or other public department, it shall be done by letter to me, that I may forward or withhold the same as I shall judge fit for his majesty's service.”

30th. “It is with regret that I advert to the recent perpetual complaints of an officer against his superior in the execution of his office; and, anxious to terminate, if possible, such conduct without resorting to extremes, I refer that officer to the serious consideration of the articles of war, Nos. 19, 21, 22, and 23, as well as the general printed instructions,—further, he herewith receives my most posi-

tive orders, never, upon any pretence whatsoever, to presume to enter into any altercation again with him upon the quarter-deck; but that he conform to the discipline of the service, and a cautious observance of the 21st article of war, as well as the 13th order, &c. &c. &c."

1825.
HANNAFORD
v.
HUNN.

The articles in the naval instructions relied on by the plaintiff as his authority for his conduct, and which were also read in evidence, were the following:—

Sect. 1, chap. 1, *Art. 7.* "If an officer shall observe any misconduct in his superior, or shall suffer any personal oppression, injustice, or other ill treatment, he is not, on that account, to fail in any degree in respect due to such superior officer; but he is to represent such misconduct or ill treatment to the captain of the ship to which he belongs, or to the flag-officer commanding the squadron in which he serves, or to the commander in chief, as circumstances may require."

Art. 9. "If an officer or other person shall have occasion to represent the misconduct of any officer, or shall have cause of complaint, he is to represent it to the captain of the ship to which he belongs; but if the captain shall not attend to his representations, or if the captain be the officer whose misconduct he shall think it necessary to represent, or of whose ill treatment he shall have cause to complain, he is to make his representation to the commander in chief, to the superior officer present, or to the Secretary of the Admiralty, as circumstances may require."

Art. 15. "If an officer shall at any time receive from his superior an order which may be contrary in any respect to any article in these general instructions, or to any particular order he may have received from the Lords Commissioners of the Admiralty, or from any superior officer, he is to represent in writing such contrariety to the officer from whom he shall have received the order; but if after such representation, that officer shall direct him to obey the

1825.
 HANNAFORD
 v.
 HUNN.

order he has given him, he is to obey it, and report the circumstances to the commander in chief, or to the Secretary of the Admiralty, as may be necessary."

It appeared from the evidence, that between the 13th August, when the plaintiff was first required to sign the order-book, but refused, and the 31st when he did actually sign it, no repetition of the order to sign had been given by the defendant: it was, therefore, contended for the plaintiff, that he had acted properly in the affair, and was not guilty of any breach of his duty.

It did not appear that there was any unnecessary delay in bringing the plaintiff to trial by the court-martial.

The charges exhibited by the defendant before the court-martial against the plaintiff, were as follow:—

1st Charge. For a breach of the 19th, 22d, and 23d articles of war, on or about the 29th July, and 7th August, by conduct as set forth in Lieutenant Kelly's letter of the latter date.

2d Charge. For behaving to me with disrespect and contempt, on or about the 10th day of August, in declaring that he stood too high at the board (Navy Board) to be afraid of or hurt by any representation I could make of his conduct.

3rd Charge. For disobedience of orders and un-officer-like conduct, between the 10th day of August, and 29th of the same month.

4th Charge. For making insertions in the log-book relative to me, without my directing him so to do, more particularly on the morning of Sunday, the 29th August; and being guilty of falsehood and prevarication when taxed therewith on the quarter-deck.

As to the first and second charges, the court-martial were of opinion, that they could not decide upon them, inasmuch as the first arrest having been put an end to on

the 17th August, all charges prior to that time were done away with.

As to the third and fourth charges, the court were of opinion that they were in part proved, and decided that the plaintiff should be reprimanded, and admonished to be more careful in his behaviour in future.

1825.
HANNAFORD
v.
HUNN.

The *Attorney-General*, for the defendant, contended, that although the court-martial were in error in not deciding on the first and second charges which related to the first arrest; yet as the whole affair had been investigated, and evidence heard on both sides, it was not competent to go into the investigation a second time before a tribunal of a different description. He relied on the sentence of the court as conclusive upon the question.

ABBOTT, C. J.—I think, if you mean to say, that you put the plaintiff under arrest in order to bring him to a court-martial, and that you did so bring him, and rely on the sentence of the court-martial as conclusive, you must so plead it, and plead it by way of estoppel. By this form of pleading you consent to bring the question before a jury. The questions are, whether the defendant did put the plaintiff under arrest for the charges alleged in the pleas; and I take it that the truth of those charges is to be inquired of here. One set of pleas justifies the arrest, on the ground of a charge of disobedience made by another officer. And I shall tell the jury, that if they think the arrest took place in consequence of the charges made by Lieutenant Kelly, then they must find their verdict for the defendant: and I shall leave it to them to say, whether it took place for that or for any other cause.

The *Attorney-General* then addressed the jury, and called a witness, whose testimony, though it shewed some acts of impropriety on the part of the plaintiff, did not materially vary the case as proved by his witnesses.

1825.
HANNAFORD
v.
HUNN.

ABBOTT, C. J. in his summing up said—The arrest in this case is what is called close. But I am of opinion, in point of law, that it is in the discretion of the superior officer to say, whether an arrest shall be close or at large. If he put a party under arrest without cause, then the difference is matter of consideration, only with a view to the estimate of damages. Upon this record, I am of opinion, in point of law, that it is left for you to inquire whether the arrest took place on any of the alleged grounds, either in consequence of disobedience to the defendant, or of a charge made by another superior officer. If you think that the cause of arrest was, on both days, the complaint made by Lieutenant Kelly, then you will find for the defendant on those pleas which so state it; but if you think that it was not for that, but for the others, *viz.* that the plaintiff had in fact disobeyed, quarrelled, &c., then I am of opinion, that you are at liberty to inquire into the truth of the charges made. The letter of the 14th of August, is stated by the defendant to be his ground of arrest in his letter to the Admiral. But I think that he is not to be held strictly to the circumstance of the letter; but if he can shew improper conduct before, he is at liberty to take advantage of it. There is no entry in the log-book previous to that time. I think that the letter of remonstrance respecting the signing of the orders, is not an act of disobedience. It is not necessary that I should give any opinion, as to whether any thing in the defendant's order-book was contrary to the printed instructions. I think it was competent to the captain to make the order about the bullion. I think the defendant was justified in asserting that quarrels had taken place, without mentioning the names of the parties: and I think that the order made by the defendant about sending letters through him to the commander in chief, is at variance with or at least hardly warranted by the printed instructions; but I do not think it necessary to lay down any positive opinion on the subject. The question as to the first ar-

rest is, did the plaintiff disobey the captain and refuse to sign the orders? As to the second arrest, I think it seems to have been made in consequence of the entry in the log-book. I find nothing in the printed instructions which requires the master to confine the entries in the log-book to that which is on the log-board, and I should be greatly surprised if it were so. If you shall be of opinion that the first arrest took place on the writing of the letter as to the signing of the orders, and that the writing such letter was not an act of disobedience; and if you shall think that the second arrest was made in continuation of the first, or on account of the insertion in the log-book, or of prevarication and falsehood, and also that the entry was not an unauthorized entry, and that there is no proof of falsehood or prevarication; then in either of these cases you will find your verdict for the plaintiff.

1825.

 HANNAFORD
 v.
 HUNN.

Verdict for the plaintiff.—Damages, 300*l*.

Brougham, Parke, and Pattison, for the plaintiff.

The *Attorney-General, Scarlett, and Maule*, for the defendant.

[Attornies—*Vincent, and C. Jones.*]

The case of *Wall v. M'Namara*, tried before Lord MANSFIELD at West. Sitt. aft. M. T. 1779, cited in 1 T. R. 536, was an action brought by a captain in the African Corps, against the defendant, who was Lieutenant-Governor of Senegambia, for imprisoning him for nine months at Gambia, under circumstances of cruelty. The defendant pleaded the general issue, intending to justify the imprisonment as under the mutiny

act, on the ground of the plaintiff's disobedience of orders. (By the army mutiny acts defendants may give special matter in evidence under the general issue). The alleged disobedience was, that the plaintiff, being ill, had left his post without leave from his superior. Lord MANSFIELD said, "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the

1825.

 HANNAFORD
 v.
 HUNN.

possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intention appears by the evidence to be upright: it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There, the principal inquiry to be made is, how the heart stood; and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But, on the other hand, if the heart is wrong, if cruelty, malice and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification, the most technically regular, from that punishment which it is your province and your duty to inflict in so scandalous an abuse of public trust. It is admitted, that the plaintiff was to blame in leaving his post; but there was no enemy, no mutiny, no danger. His health was declining, and he trusted to the benevolence of the defendant to consider the circumstances un-

der which he acted; but, supposing it to be the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of common air in a sultry climate, and shutting him up in a gloomy prison, where there was no possibility of bringing him to a trial for several months, there not being a sufficient number of officers to form a court-martial; those circumstances, independent of the clearest evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad malignant motive in the defendant, which would destroy his justification, had it even been within the power delegated to the defendant by his commission." The jury found a verdict for the plaintiff, damages, £1000.

In the case of *Warden v. Bailey*, 4 Taunt. 67, it was held that an action for false imprisonment lies by an inferior officer against his superior, for an imprisonment for disobedience of an order not within the scope of military authority, although the imprisonment had been followed by a court-martial. In that case, the law on this subject was much discussed by the learned serjeants engaged in it.

1826.

Adjourned Sittings at Westminster, after Michaelmas Term, 1825.

HUGHES v. BREEDS and Others.

Jan. 9th.

ASSUMPSIT for marble chimney-pieces sold and delivered, with the common money counts. Plea—General issue.

The question raised was, whether the following written agreement (which was not declared on in any special count), required a stamp.

“Marble chimney-pieces for the Castle Inn. Two black marble in the large room, one statuary in the back room adjoining.” (It specified several more chimney-pieces).

“Memorandum of an agreement between Breeds, Farncomb, & Co., and Thomas Hughes, Clerkenwell, London. *The aforesaid T. Hughes doth agree to finish the aforesaid marble chimney-pieces in a tradesman-like manner, at prices before agreed to, by the 4th of June, 1818.*”

“This agreement agreed to on the 1st day of May, 1818.

“T. Hughes doth further agree to execute the above order by the time above mentioned. In default, T. Hughes to forfeit the price of the aforesaid chimney-pieces. A bill at three months for the amount. (Signed by the parties).”

Chitty, for the defendant Farncomb, objected, that this agreement required a stamp, because the goods were not in a state to be delivered when the agreement was entered into—something more was to be done—they were to be finished. And he cited *Buxton v. Bedal*, 3 Ea. 303 (a).

(a) In that case it was held, that a contract for the *making* of goods required a stamp. The words of the exemption in the stamp act,

55 Geo. 3, c. 184, are “memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandizes.”

If a written paper contain a specification of goods, and the vendor by it agree “to finish the goods in a tradesman like manner.” This agreement does not require any stamp, as it is an agreement for the sale of goods, and not for the doing of work. And it need not be specially declared on.

1826.
 }
 HUGHES
 v.
 BREEDS.

ABBOTT, C. J.—I think this is a contract relating to the sale of goods; and, therefore, within the exception of the stamp act: the defendants order the goods, and the plaintiff is to complete and send them. That is only goods sold.

Campbell on the same side.—Perhaps your Lordship will save the point. This agreement was entered into before the goods were complete; and therefore is an agreement for work to be done, as well as for the sale of the goods when complete, and therefore ought to be stamped. The plaintiff first agrees to make what were blocks of marble into chimney-pieces; and then to sell them to the plaintiff: it cannot, therefore, be an agreement for the sale of goods, as they were not goods in a state to be sold at the time of entering into the contract.

ABBOTT, C. J.—It by no means appears that the chimney-pieces did not exist at all, but rather the contrary, for it seems they only required to be finished. I am clearly of opinion, that this is a contract relating to the sale of goods, and therefore does not require any stamp. I think that the fact, that something remained to be done to the goods before the delivery makes no difference; indeed, I have no doubt on the point.

Verdict for the plaintiff.—Damages, 77*l.* 16*s.*

Gurney and *D. F. Jones*, for the plaintiff.

Campbell and *Chitty*, for the defendant *Farncomb*.

Hutchinson, for the defendant *Breeds*.

[Attornies—*G. Selby*, and *Knowles* for the defendant *Breeds* and *Gregson & F.* for the defendant *Farncomb*.]

DAFTER v. CRESWELL, Esq.

1826.

Jan. 11th.

ASSUMPSIT for work and labour as a servant.

It appeared on the part of the plaintiff, that he was employed as the cuddy-servant of the Astell East India ship, of which the defendant was the captain; and the plaintiff's former master, Captain Freeman, proved, that he had employed him, and found him a valuable cuddy-servant, and always gave him enough to make up his seaman's wages 35*l.* a year. The cuddy-servant is the person who waits at dinner, &c. on the passengers on board East Indiamen.

Scarlett for the defendant.—I submit, that the plaintiff must be called, for he has executed the ship's articles as an able seaman, at 35*s.* a month wages; and, according to the authorities and the act of parliament, he can recover no more. In the case of *White v. Wilson*, 2 Bos. & Pul. 116, it was laid down, if a man agree by the articles to serve for certain wages, he cannot recover more. And by the stat. 2 Geo. 2, c. 36, the owners of ships are obliged to have articles signed containing the terms agreed on. And it has been held also in the Admiralty Courts, that no man can recover more than is specified in the ship's articles. Now the defendant had been paid the sum specified in the articles, and more.

The ship's articles, signed by the plaintiff, and dated December 2nd, 1819, were put in. By those, it appeared that the plaintiff agreed to serve as an able seaman at the wages of 35*s.* a month; and the purser proved payments to him to more than that amount.

Gurney for the plaintiff.—We do not go for seaman's wages.

ABBOTT, C. J.—I think you ought to be nonsuited. I am of opinion, that, in point of law, the ship's articles are conclusive. If you had proved a distinct contract for the plain-

If one execute a ship's articles to serve on board as an able seaman, at certain wages, and when on board act as a cuddy servant; if there be no express agreement that he shall receive separate wages as a cuddy-servant, he can maintain no action against the captain for wages in that capacity. Whether he could, if there were an express agreement.—*Quære.*

1826.
DAFTER
v.
CRESSWELL.

tiff to recover more, I would have allowed you to go on, but you only attempt to raise an implied assumpsit.

Gurney.—I was going to contend, that the case was distinguishable from the authority cited: that was the case of a mate whose services, were of a kind to be within the articles, but the plaintiff's services, for which he now claims a compensation, were distinct from those of a seaman, namely, those of a cuddy-servant. The defendant does not take him, because he is a seaman, but goes and asks his character of a former master; and we have also proved that a cuddy-servant receives wages.

ABBOTT, C. J.—The only evidence is, that Captain Freeman used to pay his cuddy-servant.

Gurney.—The plaintiff is proved to be an excellent servant.

ABBOTT, C. J.—I am very sorry to interrupt you, but I am decidedly of opinion, that if a man signs the ship's articles as a seaman, he can recover no more wages than are there agreed for, however he may be employed on board the ship; you have proved no express contract for him to be paid more; if you had, I would not have stopped the case; but as it is, I feel bound to nonsuit.

The plaintiff was then nonsuited, with liberty to move to enter a verdict for the plaintiff, if the Court above should think the action maintainable.

Gurney and *Chitty*, for the plaintiff.

Scarlett and *Cresswell*, for the defendant.

[Attornies—*W. Williams*, and *Ball & B.*]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JS.
In Bank.

1826.
DARTER
v.
CRESWELL.
Jan. 27th.

Gurney now moved in pursuance of the leave given at the trial; but the Court concurred in the opinion given by the Lord Chief Justice at the trial, and refused the rule.

By the stat. 2 Geo. 2, c. 36, § 2, it is enacted, "that if any seaman
" or mariner enter or ship himself
" on board any merchant ship or
" vessel on any intended voyage for
" parts beyond the seas, he and they
" so entering themselves as afore-
" said shall, and they are hereby
" obliged to sign such agreement or
" contract (in writing) within three
" days after he or they shall have
" entered themselves on board any
" ship or vessel, in order to pro-
" ceed on any voyage as aforesaid,
" which agreement or agreements,
" or contracts, after the signing
" thereof, shall be conclusive and
" binding to all parties, for and dur-
" ing the time or times so agreed
" or contracted for, to all intents
" and purposes, any custom or
" usage to the contrary in anywise
" notwithstanding."

Bos. & Pul. 116, was an action of assumpsit by the mate of a ship engaged in the slave trade, on a promise, that in consideration of his services, the defendant would, in addition to his wages, pay him the value of one negro slave. It was proved that mates of slave ships usually received the value of one or two slaves, if they did not misbehave, and that the defendant *had agreed* to allow the plaintiff the value of one slave. It was contended, that the act of parliament applied only to wages in the strict sense, and not to collateral perquisites, which might be agreed on. But the Court said, that it was impossible to consider this perquisite in any other light than as wages; and that, if it were otherwise, it would be the means of evading the statute.

The case of *White v. Wilson*, 2

STOCKDALE v. ONWHYN.

Jan. 11th.

CASE for pirating a work, published by the plaintiff, entitled "*Memoirs of Harriette Wilson (a)*." Plea—General issue.

No action can be maintained for pirating a work which professes to be

the amours of a courtesan, and it is no answer to the objection that the defendant is also a wrong doer in publishing them, and that he therefore ought not to set up their immorality. *Semble*, that a person being seen correcting the MS. is not sufficient evidence that the copyright of a work is his.

(a) The statute 54 Geo. 3, c. 156, § 4, recites that, by an act of the eighth year of Queen Anne, and the forty-first year of his late majesty's reign, "the author of
" any book or books, and the

1826.
 STOCKDALE
 v.
 ONWHYN.

To shew the work to be the copyright of the plaintiff,
 a witness was called, who stated, that, before it was print-

“ assignee or assigns of such au-
 “ thor, respectively, should have
 “ the sole liberty of printing and
 “ reprinting such book or books
 “ for the term of fourteen years,
 “ to commence from the day of
 “ first publishing the same, and
 “ no longer; and it was provided,
 “ that after the expiration of the
 “ said term of fourteen years, the
 “ right of printing or disposing of
 “ copies should return to the au-
 “ thors thereof, if they were then
 “ living, for another term of four-
 “ teen years: And whereas it will
 “ afford further encouragement
 “ to literature, if the duration of
 “ such copyright were extended
 “ in manner hereinafter mention-
 “ ed; Be it further enacted, that,
 “ from and after the passing of
 “ this act, the author of any book
 “ or books composed and not
 “ printed and published, or which
 “ shall hereafter be composed, and
 “ be printed and published, and
 “ his assignee or assigns, shall have
 “ the sole liberty of printing and
 “ reprinting such book or books
 “ for the full term of twenty-eight
 “ years, to commence from the
 “ day of first publishing the same,
 “ and also, if the author shall be
 “ living at the end of that period,
 “ for the residue of his natural
 “ life; and that if any bookseller
 “ or printer, or other person what-
 “ soever, in any part of the unit-
 “ ed kingdom of Great Britain
 “ and Ireland, in the Isles of Man,
 “ Jersey or Guernsey, or in any
 “ other part of the British do-
 “ minions, shall, from and after

“ the passing of this act, within
 “ the terms and times granted and
 “ limited by this act as aforesaid,
 “ print, reprint or import, or shall
 “ cause to be printed, reprinted
 “ or imported, any such book or
 “ books, without the consent of
 “ the author or authors, or other
 “ proprietor or proprietors of the
 “ copyright of and in such book
 “ and books, first had and obtain-
 “ ed in writing; or, knowing the
 “ same to be so printed, reprinted
 “ or imported, without such con-
 “ sent of such author or authors,
 “ or other proprietor or proprie-
 “ tors, shall sell, publish or expose
 “ to sale, or cause to be sold, pub-
 “ lished or exposed to sale, or
 “ shall have in his or their pos-
 “ session for sale, any such book
 “ or books, without such consent
 “ first had and obtained as afore-
 “ said, then such offender or of-
 “ fenders shall be liable to a spe-
 “ cial action on the case, at the
 “ suit of the author or authors, or
 “ other proprietor or proprietors
 “ of the copyright of such book
 “ or books so unlawfully printed,
 “ reprinted or imported, or pub-
 “ lished or exposed to sale, or
 “ being in the possession of such
 “ offender or offenders for sale as
 “ aforesaid, contrary to the true
 “ intent and meaning of this act:
 “ and every such author or au-
 “ thors, or other proprietor or
 “ proprietors, shall and may, by
 “ and in such special action upon
 “ the case, to be so brought
 “ against such offender or offend-
 “ ers, in any court of record in

ed, he saw the manuscript in the hands of the plaintiff, who was correcting it. But it also appeared from the cross examination of the plaintiff's witnesses, that the work professed to be an account of the amours of Harriette Wilson, a courtesan; and that it contained the particulars of an intrigue between a person stated to be a Colonel, and a female called Julia; and also a conversation between Harriette

1826.
STOCKDALE
v.
ONWHYEN.

“ that part of the said United
“ Kingdom, or of the British Do-
“ minions, in which the offence
“ shall be committed, recover
“ such damages as the jury on the
“ trial of such action, or on the
“ execution of a writ of enquiry
“ thereon, shall give or assess,
“ together with double costs of
“ suit; in which action no wager
“ of law, essoin, privilege or pro-
“ tection, nor more than one
“ imparlance, shall be allowed;
“ and all and every such offender
“ and offenders shall also forfeit
“ such book or books, and all and
“ every sheet being part of such
“ book or books, and shall deli-
“ ver the same to the author or
“ authors, or other proprietor or
“ proprietors of the copyright of
“ such book or books, upon order
“ of any court of record in which
“ any action or suit in law or
“ equity shall be commenced or
“ prosecuted by such author or
“ authors, or other proprietor or
“ proprietors, to be made on mo-
“ tion or petition to the said court;
“ and the said author or authors, or
“ other proprietor or proprietors
“ shall forthwith damask or make
“ waste paper of the said book or
“ books and sheet or sheets; and
“ all and every such offender and
“ offenders shall also forfeit the

“ sum of Threepence for every
“ sheet thereof, either printed or
“ printing, or published or exposed
“ to sale, contrary to the true in-
“ tent and meaning of this act;
“ the one moiety thereof to the
“ king's most excellent majesty,
“ his heirs and successors, and the
“ other moiety thereof to any
“ person or persons who shall sue
“ for the same, in any such court
“ of record, by action of debt, bill,
“ plaint or information, in which
“ no wager of law, essoin, privi-
“ lege or protection, nor more
“ than one imparlance shall be
“ allowed: Provided always, that
“ in Scotland such offender or of-
“ fenders shall be liable to an ac-
“ tion of damages in the court of
“ session in Scotland, which shall
“ and may be brought and prose-
“ cuted in the same manner in
“ which any other action of da-
“ mages to the like amount may
“ be brought and prosecuted
“ there; and in any such action
“ where damages shall be award-
“ ed, double costs of suit or ex-
“ pences of process shall be al-
“ lowed.”

By § 10, it is provided that all actions shall be commenced within twelve months next after the offence committed.

1826.
STOCKDALE
v.
ONWHYN.

Wilson and a nobleman, who was named, who wished to procure her as a mistress for his son.

ABBOTT, C. J.—How is the copyright shewn to be in the plaintiff?

Brougham, for the plaintiff.—We shew the manuscript to be in his hands before it was published.

ABBOTT, C. J.—Then the action cannot be maintained on another ground. This is a work that the law will not protect.

Brougham.—In every case that has occurred, the objection to the morality of the work has been taken by innocent parties, and not by one defending his own wrong.

Scarlett, for the defendant.—The question here is, whether the plaintiff can make out such a case as will entitle him to recover.

ABBOTT, C. J.—Every one who comes to seek the protection of the law for his property, must shew that property to be worthy of that protection; now this is professedly the history of a courtesan.

Brougham.—There are many excellent works in which objectionable passages might be found.

ABBOTT, C. J.—The distinction between the works you allude to and the present is this: in those, although some passages might be found which are of an objectionable nature, yet the general tendency of those works is good. Now, this work is professedly bad, and cannot be defended in any way. The plaintiff must be called.

Nonsuit.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

1826.
 STOCKDALE
 v.
 ONWHYN.
 Jan. 28th.

Brougham now moved for a rule *nisi* for a new trial. The doctrine, that there can be no property in a work like this, rests on a dictum of Lord Chief Justice EYRE, on the Midland Circuit (*b*). And the Lord CHANCELLOR re-

(*b*) The case before Lord Chief Justice EYRE, stated by Sir S. Romilly, 2 Mer. 437, was an action brought by Dr. Priestley against the hundred, "for damages for the injury sustained by him in consequence of the riotous proceedings of a mob at Birmingham; and, among other property alleged to have been destroyed, he claimed a compensation for the loss of certain unpublished MSS. offering to produce booksellers as witnesses, to prove that they would have given considerable sums for them. On behalf of the hundred, it was alleged that the plaintiff was in the habit of publishing works injurious to the government of the state; but no evidence was produced to that effect: upon which Lord Chief Justice EYRE said, if any such evidence had been produced, he should have held, it was fit to be received as against the claim made by the plaintiff."

In the case of *Walcot v. Walker*, 7 Ves. 1, the plaintiff prayed an injunction to prevent the defendant selling his works; as to one edition they submitted, but the Lord Chancellor (ELDON) said, "If the doctrine of Lord Chief Justice EYRE is right, and I think it is, that publications may be of such a nature that the author can

maintain no action at law, it is not the business of this Court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of such a nature, that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer, that the defendants are as criminal. It is the duty of the Court to know whether an action at law would lie; for if not, the Court ought not to give an account of the unhallowed profits of libellous publications."

In the case of *Southey v. Sherwood*, 2 Mer. 437, the Lord Chancellor said, "a distinction has been taken, to which a considerable weight of authority attaches, supported as it is by the opinion of Lord Chief Justice EYRE, who has expressly laid it down that a person cannot recover in damages for a work which is in its nature calculated to do injury to the public. On the same principle, the Court refused an injunction in the case of *Walcot v. Walker*, inasmuch as he could not have recovered damages in an action. After the fullest consideration, I remain of the same opinion as that which I

1826.
 STOCKDALE
 v.
 ONWHYN.

lied on that dictum in the case of *Walcot v. Walker*, 7 Ves. 1; but it is one thing to refuse an injunction, and another to hold that no action is maintainable. The most accurate account of that dictum will be found in the argument of Sir S. Romilly, in the case of *Southey v. Sherwood*, 2 Merivale, 436, where it is stated, that Lord Chief Justice EYRE said, in an action by Dr. Priestley against the hundred, for damages done by a riotous mob, and for the loss of certain unpublished manuscripts; that if it had appeared that the manuscripts had been works injurious to the government, he should have held it fit matter to be received as evidence against the plaintiff's claim. In the case of *Forest v. Johns*, Esq. 4 Esp. 97, where the plaintiff had given a general order for "all the caricature prints that had ever been published," and obscene ones were sent, Mr. Justice LAWRENCE said, that he could not permit the plaintiff to recover for those; but no decision was come to in that case, as it was referred: and another question might have arisen there, namely, whether the print-seller was entitled, under a general order, to send prints of that description. Suppose a party to have stolen the book, could he say that he is not guilty of larceny, because the book was of an improper tendency.

LITTLEDALE, J.—There is a difference between an infringement of copyright and a larceny: in the case of a larceny, the matter of which the book is composed is stolen,—the paper, &c.

entertained in deciding the case referred to."

With regard to the case of *Bell v. Walker* and Another, 1 Br. C. C. 451, it should be observed, that in the report nothing at all appears even tending to shew that the Apology for the life of George Ann Bellamy, was a work of libellous

or improper tendency; and the injunction was granted on the *ex parte* application of the plaintiff, only till answer and further order.

The cases of *Forest v. Johns*, 4 Esp. 97, and *Hyme v. Dale*, 2 Camp. 29 (n), only go to the points stated by Mr. Brougham in his argument.

Brougham. — But the doctrine ought to be pushed one step further, if it is applied at all; and a Court should hold that even the paper was not protected, if converted to such a use. The argument used is, that, giving such works no protection, tends to suppress them. Now this is not so; for the dissemination of such works is much assisted, all the world being enabled to publish them; and if the principle be admitted, it not only applies where the whole is objectionable, but also where any part of it is bad. Thus the maxim of *ubi plura nitent* must be regarded as critical only, and not applicable in a legal point of view.

1826.
STOCKDALE
v.
ONWHYEN.

BAYLEY, J. — You must take out the *maculæ*.

HOLBOYD, J. — Is it not the injury done to the publication that you complain of; and how can injury be done where there is no right to publish.

Brougham. — In the case of *Hyme v. Dale*, 2 Camp. 29 (n), it was objected, that a stanza of a song was a libel on the administration of justice; and Mr. Justice LAWRENCE said, that that argument equally applied to the Beggar's Opera, where the language and allusions were sufficiently derogatory to the administration of public justice; but the action was maintained. In the case of *Bell v. Walker*, 1 Br. C. C. 451; Lord KENYON granted an injunction to restrain the defendant from pirating a work called "An Apology for the Life of George Ann Bellamy," which was a history of her amours: and it should be observed that, in the case of *Hyme v. Dale*, Lord ELLENBOROUGH did not say he would nonsuit, even in the case of a libel so gross as to affect the public morals, but only that he would advise the jury to give no damages; by which his Lordship, no doubt, meant nominal damages. And the statutes were intended not only to protect the property of works, but to prevent piracy; and they did not give an action for an infringement of copyright, but rendered piracy punishable,

1826.
STOCKDALE
v.
ONWHYN.

by enacting, that the sheets should be given up, and certain penalties imposed.

ABBOTT, C. J. — This was an action brought for an injury done by the publication of a work first published by the plaintiff. From the evidence at the trial, it was perfectly clear that the work was, and indeed professed to be, a history of the amours of a courtesan. It contained not only much indecency, but much slanderous matter, with the names of the persons so slandered. The question therefore is, whether the plaintiff can claim damages for a supposed loss sustained by him in consequence of the invasion of his sale. If the plaintiff had no right to sell, how can he maintain an action. Every party concerned in ushering such a book into the world, has committed an offence against decency. Common sense, common law, and common justice, equally point out what should be the decision of the Court. I want no authority to warrant me in this judgment. I will however make one or two remarks on the decisions in Equity. One learned and eminent person, presiding in a Court of Equity, might think, that the best mode of putting down such works was an injunction to restrain their publication; another might think that that object would be best accomplished by not granting an injunction to protect them, as persons would then have less inducement to publish them in the first instance; the inducement to such publications being the desire of gain. On the comparative advantages of these two courses, I have not to decide: but as to the question immediately before this Court, it would be a disgrace to the common law if a judge could for a moment entertain a doubt about it.

BAYLEY, J. — I concur entirely in what has been so forcibly stated by my Lord Chief Justice. In the case of *Southey v. Sherwood*, the principle that no person could have any right of property in any such work, was fully recognized.

HOLROYD, J.—I am of the same opinion.

LITLEDALE, J.—The statutes on this subject are intituled “Acts for the encouragement of learning.”

Rule refused.

Brougham and Richards, for the plaintiff.

Scarlett and Chitty, for the defendant.

[Attornies—*Noele*, and *Johnson*.]

1826.
STOCKDALE
v.
ONWHYN.

WATSON v. WACE and Others.

Jan. 12th.

TRESPASS for taking the plaintiff's goods. Pleas—
1st. General issue. 2nd. A justification under a commission of bankrupt sued out against the plaintiff.

The taking of the goods was admitted.

F. Pollock for the defendants.—The defence in this case is, that after the commission of bankrupt issued against the plaintiff, he being still in custody at the suit of three several creditors who had proved under the commission, he applied to a judge at chambers to be discharged out of custody on that ground, and obtained an order for his discharge. Now, if he availed himself of the advantages of this commission, and set it up for the purpose of getting himself discharged from custody, he cannot be allowed to contest its validity. The case of *Goldie v. Gunston*, 4 Camp. 381, was an action of trover by a bankrupt, to try the validity of the commission against him. In that case, orders for the discharge of the bankrupt out of custody, on the ground of his bankruptcy, were put in. It was contended, that the bankrupt might have applied for his discharge through ignorance. But Lord ELLENBOROUGH held, that if a man took advantage of a commission against him, he was precluded from afterwards contesting its va-

If a person against whom a commission of bankrupt is sued out, apply to a judge at Chambers, and obtain his discharge from custody, on the ground that his detaining creditors have proved under the commission, such person is by so doing precluded from disputing the validity of the commission, in a court of law, but may apply to the Great Seal.

1826.
 {
 WATSON
 v.
 WACE.

lidity at law, though he might still apply to the Great Seal to supersede it; but his Lordship considered, that the mere fact of surrendering to a commission, would not be sufficient, as that was compulsory. And in the present case, the bankrupt having applied for his discharge under the commission, was estopped from disputing it.

Three Judges' summonses were put in, calling upon the plaintiffs in three actions against the bankrupt to shew cause, why he should not be discharged out of custody, the detaining creditors having proved their debts under a commission of bankrupt issued out against him.

The Judges' orders were also put in, and the affidavits on which they were grounded; the latter stated, that the commission had issued, on which the plaintiff was *duly* declared a bankrupt.

Scarlett, contra.—My Lord ELLENBOROUGH held very strictly the acts of persons who took advantage of a bankruptcy; for his Lordship used to hold, that the bankrupt's treating with the assignees, was acknowledging the goodness of the commission; but that has not been the case since. And the statute 48 Geo. 3, c. 121, § 14, enacts, that the proving a debt under a commission of bankrupt by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved. Now, the proving being the act of the creditor, the bankrupt ought not to be prejudiced by taking all the advantages which may result from it.

Campbell on the same side.—This act of admission by the bankrupt, like every other admission, is only *prima facie* evidence, and not conclusive. It is no more than his saying "I was duly declared a bankrupt:" and the hardship of the case is, that if the commission against him be not good, he cannot have a valid certificate founded on it.

ABBOTT, C. J.—I am clearly of opinion, that the decision of my Lord ELLENBOROUGH was right, and that I ought to act upon it. The bankrupt, by his acts, admits the validity of the commission; and asks, and obtains the benefit of it. Now, after that, he cannot turn round and say that the commission is not good. And nothing that I say, will prevent the plaintiff from making an application to the Great Seal if he shall be so advised.

1826.
WATSON
v.
WACE.

Nonsuit.

Gurney, *amicus curiæ*, stated, that he had known that decision of Lord ELLENBOROUGH acted on in more than one instance.

Scarlett and Campbell, for the plaintiff.

F. Pollock, for the defendants.

[Attornies—J. M. Taylor, and Reeves.]

DENN, on the demise of BULKELEY, v. WILFORD.

Jan. 16th.

EJECTMENT to recover a mansion and other houses and lands at Chelsea. The lessor of the plaintiff was the heir at law of the late General Wilford, and had, by a former ejectment, (see *ante*, vol. 1, p. 284) recovered certain property there, called the Ranelagh property. The late General's estate at Chelsea consisted of not quite twenty acres, of which the Ranelagh property was eighteen and a half. On the whole estate there were nineteen houses, including the mansion; on the Ranelagh property, twelve. The mansion house was not on the Ranelagh property. The General having, in the year 1822, contracted to sell about seven acres of the Ranelagh property to the governors of Chelsea Hospital, levied a fine of "twelve messuages, twelve gardens, twenty acres of

A fine being levied of "12 messuages, &c. and 20 acres of land." If it appear that there are 19 houses on the conusor's land in the place—This is such an ambiguity in the fine as to let in parol evidence, to shew what part of the property was meant to be included in the fine, although the whole of the land the conusor had were under 20 acres.

1826.

DENN

v.
WILFORD.

meadow, with the appurtenances, &c., in the parish of Chelsea."

The question therefore was, as the levying of this fine revoked a will made in favour of the defendant, who was the general's widow, whether the fine must be construed to extend to the whole of the general's estate, or whether parol evidence was admissible to shew that it related to the Ranelagh property only; and his Lordship admitted it. Parol evidence was given to shew that the fine related to the latter.

The *Attorney-General* contended, that, as the terms of the fine were large enough to cover all the property, the parol evidence could not do away with its effect: the fine was of twenty acres of land; as there were not more than twenty acres, all was included; for by levying a fine of land, the houses and every thing upon it passed; and if the General's title had been attacked as to any part, he would have set up the fine in his own favour; and if the fine would protect the whole estate, it applied equally for all other purposes.

ABBOTT, C. J.—I am of opinion, that the question, what is included in a fine, is a question of law and fact: because this fine is levied of twelve houses, and as soon as it is shewn that there are more than twelve, it is competent to the parties to shew which twelve were meant; and I shall direct the jury, that it is competent to them to consider what twelve houses were intended, and whether the mansion was one, although there may not be twenty acres of land without the ground on which that stands. I do not mean to say that it is necessary to mention messuages in a fine, or that the term "land" will not carry them; however I don't say that it will; but in this case the parties did not trust to the word land, but have put in the messuages; and I think the jury must say, on the evidence,

which twelve of the messuages were meant. If, however, the Court above should think that in this case parol evidence was not admissible, a verdict may then be entered for the lessor of the plaintiff. His Lordship then recapitulated the circumstances of the case.

1826.
 DENN
 v.
 WILFORD.

The jury were of opinion, that the fine was meant to operate on the Ranelagh property only, and found a verdict for the defendant.

The *Attorney-General*, *Scarlett*, and *Curwood*, for the lessor of the plaintiff.

Brougham and *Tindal*, for the defendant.

[Attornies—*Veal*, and *Ashmore & C.*]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JS.
 In Bank.

THE *Attorney-General* now moved for a rule to shew cause, why the verdict should not be entered for the lessor of the plaintiff. He argued that the parol evidence ought not to have been admitted. The fine being of twenty acres, there was no ambiguity. The land being all included, the houses would pass, whether mentioned or not; and, therefore, the mentioning of them will not make such an ambiguity as to let in parol evidence.

BAYLEY, J.—Is not the sum paid to the king on the levying of a fine, regulated by the number of houses?

The *Attorney-General*.—Yes, my Lord; but in Com. Dig. tit. Grant, (E. 3), it is laid down, that a grant of land includes castles, houses, and other buildings erected on the land. I do not mean to say, that it is not usual to mention messuages in fines, but it is not necessary; and if the term land passes every thing, there is no ambiguity, and the fine must speak for itself.

1826.
 DENN
 v.
 WILFORD.

LITTLEDALE, J.—How was the *præcipe* of the fine? By a grant of land, the houses on it pass; but under a *præcipe* for twenty acres of land, have you any authority to shew that a house would be included?

ABBOTT, C. J.—The different species of property included in a fine, are always mentioned in a prescribed order, which would hardly be required, if it was not necessary to mention any thing but the term land.

BAYLEY, J.—I think the omission of houses, would be a fraud on the Crown.

Rule nisi.

In Co. Litt. 4 a. it is laid down, that the term land “legally includeth also all castles, houses and other buildings, so as passing the land or ground, the structure or building thereupon passeth therewith.” And in Com. Dig. tit. Fine, (E. 3), it is said, that all things of which a fine is levied, ought to be mentioned in proper order, as an

honor before a castle, a castle before a manor, and a manor before a messuage, and things general before things special; as land, the *genus*, before meadow, pasture, wood, &c. the species. (E. 4), In a fine by the name of a messuage, a curtilage, garden, &c. pass, or they may pass by their respective names.

Jan. 16th.

HOLIDAY v. SIGIL.

In actions for money had and received, brought by the owners of lost bank notes, against those who may have got them into their hands without giving value; it is not absolutely necessary for the plaintiff to give direct evidence of the loss. It is sufficient if such circumstances are shewn as satisfy the jury of the fact of the loss.

MONEY had and received. Plea—General issue.

This action was brought to recover the amount of a bank of England note for 500*l.*, dated May 10th, 1823, No. 6869, which was alleged to have been accidentally lost by the plaintiff at Tattersall's, near Pimlico, and found by the defendant. A clerk of Marsh and Co. proved, that the plaintiff had received the note in question from their house; and it was further proved, that on the 2d of June, 1823, the plaintiff and defendant were both at Tattersall's, that being a great settling day, and much money passing. The

The

plaintiff, while at Tattersall's, complained to Sayer, a police officer, that he had lost a 500*l.* note; and also employed Mr. Lee, his attorney, to take steps for the tracing of the note. A clerk of Messrs. Ransom and Co. proved, that they received it from the defendant on the 16th June, 1823; and a witness named Chiffney, who stated that he was a trainer, proved, that he was at Tattersall's on the 2d of June, and saw the plaintiff pass by him, and as he passed, he put his hand to his breeches' pocket; and soon after, the defendant stooped and picked up something. The witness stated, that he asked him whether he had picked up any notes, and that he said, "a small note I dropped."

The defendant, when spoken to on the subject, after it was found that he had paid it in at Ransom's banking house said, that he had received it from a Mr. Wilkins, who owed him 55*l.*

No witnesses were called for the defence.

ABBOTT, C. J. (to the jury).—The question to be considered is, whether you are satisfied that the plaintiff lost this note, and that the defendant found it; for if you are, the plaintiff is entitled to your verdict. I should observe, that it is scarcely possible for a plaintiff, when his property is stolen, or accidentally lost, to prove the loss by direct evidence; and, therefore, that must in almost all cases be made out by circumstances. His Lordship recapitulated the circumstances of the case.

Verdict for the plaintiff.—Damages, 500*l.*

Scarlett and Manning, for the plaintiff.

Brougham and Tindal, for the defendant.

[Attornies—*Windus*, and *Sigil*.]

See *Gill v. Cubitts*, Ante, Vol. 1, p. 163, and 487; *Downe v. Hal-ling and Others*, Ante, p. 11.

1826.

Jan. 16th.

A person who is in the year 1823 found by an inquisition to be a lunatic from the year 1809, is liable for necessities suitable to his degree furnished to him in the year 1819, he at that time acting in all the ordinary affairs of life.

If it appeared that he had been imposed upon, it might be otherwise.

Whether a person can set up his own lunacy—*Quære*.

BAXTER and Another v. The EARL of PORTSMOUTH.

ASSUMPSIT for the hire of carriages and harness.

Scarlett for the plaintiffs opened, that the plaintiffs were coachmakers, and that the action was brought for the hire of a landau and a phaeton from the year 1819 to the year 1823. The carriages had been both continually used by Lord Portsmouth. The intended defence was, that the Noble Lord was a lunatic; but, at the time of the hiring of these carriages, and for some time after, he was not the subject of a commission of lunacy, but, on the contrary, voted as a peer on various public occasions, sometimes in person and sometimes by proxy, and also went about and acted as an ordinary person. He argued that a lunatic was not protected from contracts for necessities, and his case was like that of an infant. If unfair advantage had been taken of the Noble Lord's state of mind, that would go to cut down the bill. In the case of *Neill v. Morley*, 9 Ves. 478, Sir William GRANT would not set aside the contract of a lunatic merely because it was over-reached by the inquisition of the jury on a commission of lunacy, as it did not appear to be an unfair transaction. If the carriages were necessary and proper, the Noble Lord ought to be bound; but if they were improper (like the case of an infant), the party ought not to recover. The defendant was a peer, and it would be for the jury to say, whether the carriages were not suitable to his rank.

Evidence was given of the hiring of the carriages and harness, and of the terms.

Brougham, for the defendant.—I submit, my Lord, that the plaintiffs must be nonsuited; and my objection is this: That Lord Portsmouth had no capacity to contract; for it is admitted in this case, that, by an inquisition, dated February 28, 1823, and taken under a commission of lu-

nacy, the Noble Lord was found a lunatic, "so that he is not sufficient for the government of himself, or his manors, messuages, lands, tenements, goods and chattels; and that he has been in the same state of lunacy from the 1st day of January, 1809." Now, I submit, that a lunatic cannot contract; and the distinction relative to the contracts of an infant does not apply, because an infant can make a contract, though he may avoid it or not, as he may find it convenient; but, in the case of a lunatic, the power of contracting is wholly wanting; and it should be observed, that the case in 9 Ves. did not at all go on the ground of the things contracted for being necessities or not.

1826.
BAXTER
v.
The Earl of
PORTSMOUTH.

Scarlett, contra.—In an Anon. case, 13 Ves. 590, Lord Eldon says, that a commission of lunacy will not protect the lunatic against an action; and that a commission of bankruptcy, being a species of action, lunacy is therefore not a defence to it.

ABBOTT, C. J.—I am of opinion, that, on this evidence, the plaintiffs are entitled to recover a reasonable sum for the hire of their carriages, not on the ground of a contract, but for the actual use of the carriages; for that is very different from being bound by contracts in the ordinary meaning of the term.

Brougham.—With great submission, my Lord, the user is only adduced as evidence of an implied contract, which implied contract is sued on.

ABBOTT, C. J.—It has been doubted, whether it is competent to a person to set up his own incompetency to contract: but, going upon an executed contract is very different from attempting to bind a lunatic on a mere contract, on which nothing has been done. If a person is at large in the world, and only has what is necessary, I am clearly of opinion that it must be paid for; but if

1826.
 BAXTER
 v.
 The Earl of
 PORTSMOUTH

you shew a party to be a lunatic, and that he had something decidedly improper, I do not say that a Court and jury ought not to say that unfair advantage was taken of his state; but here, the defendant had nothing but what the most sane man of his rank ought to have. These plaintiffs are entitled to a verdict.

Verdict for the plaintiffs.—Damages, 543*l*.

Scarlett and Jardine, for the plaintiffs.

Brougham, for the defendant.

[Attornies—*Martineau & M.*, and *Plumptree*.]

Jan. 26th.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD & LITLEDALE, JS.
 In Bank.

Brougham now moved for a rule nisi for a new trial, on the ground that the inquisition unrebutted was sufficient proof of the lunacy of the defendant. A lunatic has no more contracting mind than if he were dead. It has been said, that a man shall not stultify himself; but that still it was open to the jury to say, whether they thought him sane or not. And he cited F. N. B. 466; *Stroud v. Marshall*, Cro. Eliz. 398; *Beverley's case*, 4 Rep. 126 *a*, and 127 *a*; Co. Litt. 247 *a*. and 1 Cha. Ca. 113.

BAYLEY, J.—Has lunacy ever been a defence to an action for necessaries, as meat from a butcher, or clothes from a tailor.

Brougham.—I believe not, my Lord; but I contend that he could not contract, because he had no mind. Some of the older authorities go to shew, that the party cannot himself set up this defence; but in the case of *Yates v. Boen*, 2 Str. 1104, the defence of lunacy succeeded in an action of debt; and in the cases of *Sergeson v. Sealey*, 2 Atk. 412, and *Faulden v. Silk*, 3 Camp. 126, these inqui-

sitions were held to be evidence against strangers, Lord HARDWICKE saying, that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, &c. were always admitted to be read, but not conclusive, as you may traverse them, if you please.

1826.
BAXTER
v.
The Earl of
PORTSMOUTH

ABBOTT, C. J.—Shew that he was imposed upon, and that will make a great difference.

Brougham.—The authorities go to shew, that the office has the effect of making void all contracts.

Scarlett.—Although the inquisition may be evidence, yet in this case Lord Portsmouth went about and acted as an ordinary person.

ABBOTT, C. J.—I thought that the evidence was not sufficient to defeat the action, as the goods were suitable to the degree of the defendant, and actually used and enjoyed by him. You can distinguish this case from those of contracts not executed, or which shew imposition and advantage taken of the want of understanding of the party. I desire to be understood, that my opinion does not extend to those cases.

BAYLEY, J.—Where there is no imposition, and the goods furnished were suitable to the degree of the party, I think that his being found by the inquisition to be not sufficient to govern his affairs, is not enough to put an end to the action. Many men are perfectly sound in mind on every point but one; and if persons sell them goods, about which there is nothing which affects the point on which they are of unsound mind, are those persons to lose their money when they could not be aware of any insanity? I think not. And if a person is in such a state of mind as not to be fit to act in matters of ordinary life, he should

1826.

BAXTER

v.

The Earl of
PORTSMOUTH

be placed by his friends under such a restraint, as to prevent his making such contracts as these.

HOLROYD and LITTLEDALE, Js. concurred.

Rule refused.

In F.N.B. 466, it is said, that "the writ of *dum fuit non compos mentis*, lieth where a man alieneth in fee, &c. if he be afterwards deformed by his alienor or lessee, notwithstanding his own alienation or lease: and the same appeareth by writs in the Register: and some have said, that this writ lieth not by him who alieneth the land, because he shall not disable himself, nor contradict his own deed, but that seemeth to be little reason, for this is an infirmity which cometh by the act of God; and it standeth with reason, that a man should shew how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time. And it appeareth in Britton, (tit. Dette, fo. 66), that in debt upon a bond, the defendant said, he was not *sane memorie* at the time of making the bond, and that was held a good plea. And in the Year Book, 9 Hen. 6, 6, it is laid down, "*Si on de non saine memorie face un feoffement ce est void.*"

Lord Chief Justice BROOKE in his Abridgment, tit. *Dum fuit*, pl. 3, says, that "if one of non sane memory make a feoffment, he cannot have action or entry, for he cannot disable himself—and *per PRIOR*, he cannot know in his good memory what he did while *non compos mentis*." But

his Lordship refers to F. N. B. and Britton, as before cited; and at pl. 7, takes this distinction: "If a judge or justice be of non sane memory, yet the fines, judgments, and other records that are before him, shall be good; but otherwise, of the gift of an office by him, or of this kind; for that is a matter in *fact*, and the others are matters of record; for matters in *fact* may be avoided by non sane memory, but not so matters of record."

In Litt. § 405 and 406, it is laid down, that "if one has nothing to say, but that he was not of sane memory at the time of a descent, &c. he shall not be received to say this; for no man of full age shall be received in any plea by the law to disable his own person, but the heir may well disable the person of his ancestor for his own advantage in such case." And Lord Coke, 1 Inst. 247 a, says, if an idiot make a feoffment in fee, he shall in pleading never avoid it by saying, that he was an idiot at the time of his feoffment, and so had been from his nativity. But upon an office found for the king, the king shall avoid the feoffment for the benefit of the idiot, whose custody the law giveth to the king. So it is of a *non compos mentis* by accident, if an estate be made during his lunacy; for, albeit the parties themselves

cannot be received to disable themselves, yet twelve men upon their oaths may find the truth of the matter. Lord Coke then says, that there is a difference of opinion, as to the effect of the acts of lunatics; and adds, that Littleton is of opinion, that neither by writ, plea, nor otherwise, can the lunatic himself avoid them: "and herewith the greatest authorities of our books agree, and so it was resolved in *Beverley's* case, 4 Rep. 126."

In the case of *Stroud v. Marshall*, Cro. Eliz. 398, there was a plea of lunacy to debt upon bond; the plea was held bad on demurrer, and the doctrine in F. N. B. expressly over-ruled—however, in the case of *Leach v. Thompson*, Ca. Parl. 150, the doctrine of F. N. B. was supported.

In the case of *Yates v. Boen*, 2 Str. 1104, the defendant wished to set up lunacy as a defence in an action of debt. The Lord Chief Justice at first thought, on the rule in *Beverley's* case, that no one could stultify himself; but, on the authority of *Leach v. Thompson*, and a case before L. C. B. PENCELLY, he suffered it to be given in evidence; and the plaintiff upon the evidence became nonsuit.

The case of the *Attorney-General v. Parkhurst*, Ca. Cha. 112, was a bill by the Attorney-General for the repayment of the price paid by a lunatic for an estate. It appeared, that, at the time of the purchase, the lunatic

did usually barter; but was, eight years after, found a lunatic, with a retrospect of seventeen years. The prayer of the bill was granted by Justice TYRRELL; but the Lord Keeper stayed the passing of the decree, and gave liberty to the defendant to traverse the inquisition.

In the case of *Niell v. Morley*, 9 Ves. 478, the lunatic, being a plumber, attended a sale of building materials, and bought several lots; this occurred in the month of May, 1800; in the month of August following, an inquisition was taken, finding him lunatic from the 1st of May, 1797; a bill was filed by his committee to recover back the purchase money; but there appearing nothing unfair in the sale, Sir W. GRANT refused to interpose, and said, "assuming it to be the legal consequence, that every act of the lunatic, subsequent to the time (found by the jury), is absolutely void; nothing can be more inconvenient, than for this Court to give effect to that legal consequence; setting aside every dealing in the course of his trade, giving an account of all he has lost, &c. If the plaintiff is right in saying all this is void at law, let him resort to law, and recover if he can."

In the case of *Manby v. Scott*, 2 Sid. 112, it is said, that "an infant will be bound by his contract, in a case where he is a housekeeper and bought necessities for his household; and so it may be said of an idiot in case of housekeeping."

1826.

BAXTER

v.

The Earl of
PORTSMOUTH

1826.

BEFORE MR. JUSTICE BAYLEY.
(Who sat for the Lord Chief Justice.)

Jan. 19th.

REX v. HADDEN.

On *sci. fa.* to repeal a patent for a machine, on the ground that it is not new, you may, to prove that, put into the hand of a witness, who had constructed a machine for the same purposes, a drawing not made by himself, and ask him whether he has such a recollection of the machine he made, as to be able to say, that that is a correct drawing of it.

SCIRE FACIAS to repeal a patent granted to the defendant for an improved machine, for the roving, preparing, and spinning of wool; on the ground that the machine was not new.

To prove the machine not new, a witness was called, who proved, that he had, long before the patent, constructed a machine for those purposes; and to shew that it was similar to the defendant's machine, the counsel for the prosecution put into his hand a drawing of the machine the witness had constructed. The drawing, however, was not made by the witness.

The *Attorney-General*, for the defendant, objected, that, as the drawing was not made by the witness, he ought not to look at it, but should describe the machine he had constructed; for that this was a lumping way of leading the witness.

Gurney, contra.—Plans are always put into the hands of witnesses who did not draw them.

Scarlett.—A plan of a place is certain; but this is exactly the same as if the counsel described a machine, and then said to the witness, was that what you made?

BAYLEY, J.—I think the witness may look at the drawing, and you may ask him, whether he has such a recollection of the machine he made, as to be able to say, that that is a correct drawing of it.

Verdict for the Crown.

Gurney, Alderson, and Rotch, for the prosecution.

The *Attorney-General, Scarlett, Bolland, and Brougham*, for the defendant.

[Attornies—*Evans & T.*, and *Lowden & Co.*]

1826.

REX
v.
HADDEN.

COURT OF COMMON PLEAS.

Sittings in London, in Michaelmas Term, 1825.

BEFORE LORD CHIEF JUSTICE BEST.

CURTIS v. BARKER.

1825.

Nov. 10th.

IN this case, *Hutchinson* for the plaintiff, applied on affidavit to put off the trial till the next Sitting in Term.

Vaughan, Serjt., for the defendant, objected, on the ground that a plaintiff may withdraw the record.

BEST, C. J.—It is usual to put off a trial on the application of a plaintiff shewing special circumstances, till the next Sitting, if it be in Term, or for a few days, if it be after the Term; but not beyond that. I am informed, that my Lord Chief Justice ABBOTT has taken this distinction in the Court of King's Bench; and I think it a very sensible and proper one.

Application granted.

Hutchinson, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Cooke & W.*, and *Cunningham.*]

In general, the Court will not put off the trial on the application of the plaintiff, but put him to withdraw the record. This practice is, however, sometimes inconvenient, as, by withdrawing the

record, and re-entering it, the cause is often put off for a much longer time than the parties wish. But the Court will very seldom grant this application without the consent of both parties.

A judge at *Nisi Prius* will put off a trial on application by a plaintiff till the next sitting, if it be in term, or for a few days, if it be after the term; but if longer delay be required, the plaintiff can only obtain it by withdrawing the record; but this application is never granted without very special circumstances, or the consent of the other party.

1825.

Nov. 17th.

A paper in the form of a receipt, if it is not given in evidence as a receipt does not require a stamp.

BROOKES v. DAVIES.

ASSUMPSIT on a bill of exchange against the acceptor. After the formal proof on the part of the plaintiff; a witness was called for the defendant, who stated, that after the bill was due, he took twenty yards of cloth to the plaintiff's house, together with a paper in this form:—

“ Mr. Brookes,	To J. Davies.
“ Twenty yards of cloth.	14l.
“ Overdue bill	13l.
“ Balance due	1l.
Received, J. Davies.”	

The cloth and the paper were delivered to a lady, who took them both up stairs; and, when she came down, said, that Mr. Brookes would see Mr. Davies.

Vaughan, Serjt. objected to hearing what the lady said. They should call her as a witness.

Wilde, Serjt.—She is the plaintiff's wife.

Vaughan, Serjt.—That is not proved.

Wilde, Serjt.—We may prove what was said at the time.

BEST, C. J., thought it might be proved as a fact.

The witness told the lady, that, as the bill was receipted, he must take it back. Upon which she fetched it for him, but retained the cloth. It was then proposed to read the paper.

Vaughan, Serjt., objected, that it did not appear that it had ever come to the hands of the plaintiff.

BEST, C. J. was of opinion, that, under all the circumstances, it ought to be received.

Vaughan, Serjt. then objected, that it had no stamp.

1825.
BROOKES
v.
DAVIES.

Wilde, Serjt.—I do not offer it as a receipt.

BEST, C. J.—I determined once upon the Oxford Circuit, and I believe my decision was never questioned, that a paper not put in as a receipt, does not require a stamp.

Verdict for the plaintiff.

Vaughan, Serjt., and *Richards*, for the plaintiff.

Wilde, Serjt. for the defendant.

[Attornies—*Henson*, and *Abrams*.]

BEFORE BEST, C. J., AND BURROUGH, PARK, AND
GASELBE, JS.—At Bar.

TOOTH, Demandant, v. BAGWELL, Tenant.

Nov. 21st.

WRIT OF RIGHT.—On the jurors in this case being called, it appeared that two of the knights who had chosen the grand assize were absent; one in the country, and the other from indisposition.

On the trial of a writ of right, the four knights who return the grand assize, must themselves attend and sit with twelve of the jurors whom they return; a jury of sixteen, so constituted, being by law required for the trial, and any sixteen of the assize are not sufficient.

The Court intimated an opinion, that the cause could not proceed without them.

Bosanquet and *Taddy*, Serjts., for the demandant, contended, that it was sufficient if any sixteen of the jurors attended, and that it was not necessary for all the knights to form a part of the jury. The authorities referred to

On an affidavit of particular circumstances, such as the great

age and expected death of witnesses, the Court will depart from their general rule, not to try a writ of right in an issuable term.

If it appear, on the day appointed for the trial, that one of the four knights is so ill that he not only cannot then attend, but is not likely to be able to attend on a future day, the Court will order the sheriff to summon another knight to act in his stead; and it will not be necessary that any fresh selection of a grand assize should be made by the knights, in consequence of the alteration which takes place in their body.

1825.
 TOOTH
 v.
 BAGWELL.

in the course of the argument, were Booth on Real Actions; Moore, 67; 2 Rolle's Abridgment, 674; Year Book, 22 Edw. 3, 18; Cro. Car. 511; 3 Wilson, 541.

The Court thought, that all the four knights ought to form a part of the jury for the trial of the case, and were about to direct an adjournment for default of jurors, till a day in Hilary Term, when it was suggested that it must then be again adjourned on account of the practice of the Court never to try a writ of right in an issuable Term.

Bosanquet, Serjt., submitted, that the rule was not positive.

BEST, C. J.—I have consulted the officers of the Court, and find that it is a general rule. A case has been mentioned to me of the *King v. Watson*, for high treason, which was a trial at bar in an issuable term; but that was done at the application of the *Attorney-General*, who had a right to require it.

Bosanquet, Serjt., then mentioned, that one of their witnesses, a very old person, had died during the progress of the cause; and that others of them were so aged and infirm, as not to be likely to survive much longer.

BEST, C. J.—Let an affidavit be made of those facts, and we will relax from our general rule.

The case was then adjourned to the *quarto die post* in the following Hilary Term.

1826.
 Jan. 27th.

ON this day the case was again called on, and it appeared, both from the return of the sheriff, and the evidence of a medical gentleman, that Sir George Alderson, one of the four knights, was so indisposed, that he was not only un-

able to attend then, but was not likely, from the state of his disorder, to be able to attend on any future day.

1826.
 TOOTH
 v.
 BAGWELL.

Upon this, the counsel for the demandant applied to the Court either to strike out all that had been done, and direct a commencement *de novo*, or to order process to issue for the selection of a new knight to fill the place of the one whose attendance could not be obtained.

The counsel for the tenant objected to both courses, and contended that the case must be adjourned till the knight should be able to attend. A writ of right is a vexatious proceeding, and is not entitled to any favour from the Court. In *Adams v. Radway*, 1 Marsh. 602, L. C. J. GIBBS observes, "the rule which has been adopted, on consideration, is, that as a writ of right generally seeks to disturb a possession which has continued for a considerable length of time, the Court will not assist the demandant in getting over any difficulties that may occur to him." And in the same case Mr. Justice HEATH says, "that a writ of right is in general a very vexatious proceeding." The four knights must choose twelve or more, and there can be no other mode of trial except by the four knights themselves, and twelve of those whom they summon; at least, while the four knights are living. As to the case in Coke's Entries, it is very different from this; for there, the knights had not made their election. Before the statute, in the case of a special jury, a cause must have gone off on account of illness, *pro defectu juratorum*.

BEST, C. J. — Suppose, before the statute eleven, of the jurors had died.

The tenant's Counsel. — There is a distinction between a case of death and one of temporary incapacity merely. The party in this case has no right to favour, and ought not to have more *ex debito justitiæ* than the precedents

1826.
 TOOTH
 BACWELL.

will clearly warrant. The passage in the Year Book, 22 Edward 3, 18 (a), does not amount even to an *obiter dictum*, but is only an idle discussion upon a collateral point. It may be very probable that Sir George Alderson may not be able to attend at a future day; but, notwithstanding, the Court should wait and see.

GASELER, J. — And how many of the other fifteen might die in the mean time?

The tenant's Counsel. — The law never receives or acknowledges the excuse of temporary incapacity. That a party is too ill to be likely to be able to attend is too uncertain: it may be a ground of entering a continuance, but nothing more. In the absence of precedents, and considering the vexatious nature of the proceeding itself, it is to be hoped that the Court will not think it right to interfere.

BEST, C. J. — It is said, that a writ of right is a vexatious proceeding; perhaps that is rather too strong an observation. Undoubtedly, the Court will give no assistance; but many cases may occur in which it would be against all justice to prevent a party from recovering after 20 years. I hope that it will not be long before the attention of Parliament is called to the subject, and that less than 60 years will be fixed; and that suitors will not be obliged to have recourse to a proceeding so seldom occurring, and consequently so little understood. It has been said, that, in a writ of right, a party ought not to receive indulgence; but that has been in those cases where the party's own laches has made his application necessary. "*Actus Dei nemini facit injuriam*," is one of the maxims of the law; and the principle of not

(a) The passage alluded to is the following: "Mais autres diss. q. si al. Venire fac. retourne soit qu'un est mort *Habeas corpus* issera, &c. et aus Venire, &c.

"de faire venir un autre chevalier. *Quere proces*; et s'il vient et soit challenge il sera trise in court."

granting indulgence ought not to be applied to cases of difficulty occurring by the act of God. We are asked to adopt one of two courses. 1st. We are asked to expunge all that has taken place, and let the parties begin again. To this we object, because a writ of error could not be brought, as the proceeding would not appear on the record. 2ndly. We are called upon to direct the sheriff to summon another knight to fill up the vacancy occasioned by the inability of Sir G. Alderson to attend. This plan I will allow to be adopted, and will trust that all courts will consider that that which is good sense is also good law. We have only to cure a defect; and, on the principles of common sense, the best way in which we can do that is by directing the sheriff to summon another knight. A *venire* must issue, and a *distringas* is to be added. When the knight comes, there will be no occasion to choose another grand assize. It is said, that the opinion of the judges in the case in 22d Edward 3rd. is a mere *obiter dictum*. It is true, that it is so, and if we had the benefit of decided cases and personal experience, as we have upon subjects which are often before us, we should pay perhaps but little attention to such an opinion. But we ought to consider that it is an *obiter dictum*, delivered when the subject was of more frequent occurrence, and not met by any counter authority. Unless we are to say that, although the legislature has left the writ of right standing, we are not to facilitate its execution, we must grant the application in the second alternative. My brother *Wilde* has said, that the evidence of illness in this case is too uncertain; but medical evidence is every day acted upon in discharging jurors, and putting off trials. It is true, that the case in Edward 3rd is a case of death, and therefore is a little different from this; but the law would ill deserve the name of a science, if we were bound to find a precedent for every case that occurs. That which is done in a case of death, ought to be done under circumstances which are equivalent to

1826.
 ToOTH
 v.
 BAGWELL.

1825.
 CHILD
 v.
 GRACE.

I never will receive such evidence, unless, as my Lord Kenyon used to say, the twelve Judges in the House of Lords tell me that I must.

Verdict for the plaintiff.

Wilde, Serjt. and *Abraham*, for the plaintiff.

Taddy, Serjt. for the defendant.

[Attornies—*Mayhew*, and *Griffin*.]

Sittings in London, after Michaelmas Term, 1825.

Nov. 30th.

DICKINSON and Another v. GOOM and BARNES.

In an action on a joint contract against two defendants, an arrangement proposed by one defendant that each should pay a moiety of the damages, cannot be made, unless the other defendant consents, either in person or by counsel, although it is a relief of such defendant, who might otherwise have execution taken out against him for the whole.

ACTION for not accepting a quantity of gum. The defendant Goom made no defence.

Vaughan, Serjt., when the joint contract of the two defendants had been proved, proposed that an arrangement should be made, by which Barnes should pay one half, leaving the other half to be paid by Goom.

BEST, C. J.—I cannot allow of this arrangement. Goom is not here to consent. I must send the case to the jury.

Vaughan, Serjt.—It is in relief of Goom.

BEST, C. J.—I cannot help that. He must consent, or the case must go on.

Goom himself not being present, his attorney instructed counsel on his behalf, who consented to the arrangement, and the verdict was taken against both defendants for the whole; the parties entering into a rule that execution

should be taken out against each defendant for one moiety only.

1825.
 DICKINSON
 v.
 GOOM.

Adams, Serjt. and *Moody*, for the plaintiff.

Vaughan, Serjt. for the defendant *Barnes*.

Payne, for the defendant *Goom*.

[Attornies—*Alliston & H.*, and *Carter & A.*]

TAYLOR v. FORSTER.

Nov. 30th.

ASSUMPSIT for goods sold. The dispute in the cause was, whether or not an actual sale had taken place.

The clerk to the plaintiff's attorney proved, that when he served the writ on the defendant upon his own premises, the defendant pointing to some articles said, "there are the goods."

The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself.

Upon this, the defendant's counsel asked him, whether he did not know from the plaintiff that the defendant had returned the goods, and that the plaintiff had afterwards sent them back.

The plaintiff's counsel objected. It is a privileged communication.

BEST, C. J.—Does that extend to an attorney's clerks?

Vaughan, Serjt.—I apprehend it does to the whole of his clerks. Attornies must employ clerks—they cannot transact all their business in person.

BEST, C. J.—I think it is so.

The question was not allowed to be put.

The plaintiff was afterwards nonsuited.

1825.
 TAYLOR
 v.
 FORSTER.

Vaughan, Serjt. and *F. Pollock*, for the plaintiff.

Justice, for the defendant.

[Attornies—*Cousins & H.*, and *Fisher & S.*]

In the case of *Du Barré v. Livette*, Peake, N. P. C. 78, cited in *Wilson v. Rastall*, 4 T. R. 756, it was held, that the person who interpreted between the attorney and client, was in the same situation as the attorney in this respect; and in *Parkins v. Hawkshaw*, 2 Stark. 239, the same was held as to communications between the defendant and the agent of the defendant's attorney.

Nov. 30th.

JONES v. STROUP and Wife.

A witness has no right to refresh his memory with a copy of a paper made by himself six months after he wrote the original, although the original is proved to be so covered with figures that it is unintelligible; the original paper having been written near the time of the transaction.

SLANDER.—The witness who proved the words, read them from a paper which he acknowledged was a copy of an original memorandum; he said, that he made the memorandum very near the time when the words were spoken, and the copy about six months after. The original paper could not be found. The witness said, that he had given it to the plaintiff's attorney. The attorney admitted, that he had seen it; but stated, that he had returned it almost immediately to the witness. And he added, that it was unintelligible, being almost covered with figures.

The defendant's counsel objected to the witness's refreshing his memory from the copy.

Adams, Serjt., for the plaintiff.—I submit, that the witness has a right to refresh his memory with the copy, as it appears in evidence that the original paper is mutilated.

BEST, C. J.—I am quite clear, that he has no such right. He can only look at the original memorandum made near the time.

After searching in his pockets for some time, the wit-

ness discovered the original paper. From the copy, and also from his own memory when forced to put up the copy, he had proved the words as all *addressed to* the plaintiff; but when he came to look at the original paper, he acknowledged that part of them were *spoken of* him. This created a variance; the words in the declaration having all been laid as spoken to him.

1825.
JONES
v.
STROUD.

BEST, C. J. observed.—I remember a case tried before me, in which a witness proved, from memory, an unconditional promise of marriage. I perceived him searching his pockets for a paper, which, when found, I asked to look at. I saw from it, that the promise was qualified by a condition, and corresponded with the terms of the declaration. He said, the paper had been made that morning. The first thing I did was, to call the plaintiff, and the next to commit the witness. A man's life and property would be in a wretched situation, if evidence of the description attempted to be introduced to-day were to be allowed. The importance of seeing the original paper in this case is clearly shewn; for, without it, the witness proved that all the words were addressed to the plaintiff; and from the paper it appeared, that great part of them were spoken of him, and addressed to others. On this variance, the plaintiff must be called.

Nonsuit.

Adams, Serjt. for the plaintiff.

Vaughan, Serjt. and *Abraham*, for the defendant.

[Attornies—*Gray*, and *Sandom*.]

1825.

Adjourned Sittings at Westminster, after Michaelmas Term, 1825.

Dec. 1st.

DREW v. DURNBOROUGH.

The fact of a letter having been sent to a woman some years before her death, is not sufficient to raise a presumption that such letter is in the custody of her executrix three or four years after, as the testatrix might have destroyed it in her lifetime.

ISSUE from the Vice-Chancellor. In the course of the cause, it appeared that a letter, bearing on the matter in dispute, had been sent to a Mrs. Chamberlane, (whose executrix the defendant was), some years before her death, which took place in 1820.

Vaughan, Serjt. for the plaintiff, submitted, that the having traced the letter into the hands of the testatrix, was sufficient to raise the presumption that it was in the possession of the executrix.

BEST, C. J.—I am inclined to think that it is not sufficient. Have you any case upon the point? I never knew the doctrine carried so far before. The letter might have been destroyed before the death of the testatrix.

Vaughan, Serjt. for the plaintiff.

Taddy, Serjt. and *Andrews*, for the defendant.

[Attornies—*Gough*, and *Drew & Sons*.]

Dec. 1st.

POPLETT v. STOCKDALE.

A printer cannot recover against a publisher for printing a work which contains the life of a prostitute, and the history of her amours with various persons; and it is no answer that the parties are in *pari delicto*.

THE declaration stated that, in consideration that the plaintiff would print for the defendant a book called "The Memoirs of Harriette Wilson," the defendant undertook

Whether a witness, called on behalf of a plaintiff to prove an agreement, who admits on his cross-examination that the signature to the agreement is his and not the plaintiff's, can be asked whether he signed it on behalf of the plaintiff and as his agent—*Quære*.

to pay a certain price weekly, and the balance, on ceasing to employ him, by an acceptance at three months. That the plaintiff printed a part of the work, and on the 16th April the defendant ceased to employ him; but neglected to give an acceptance for the balance, notwithstanding a bill had been drawn for the amount. Plea—The general issue.

1825.
POPLETT
v.
STOCKDALE.

There was a written agreement, containing the terms mentioned in the declaration. There were two parts of it, one signed by the defendant, and the other signed "J. J. Poplett." The plaintiff's son, who was called as a witness for the plaintiff, admitted, on his cross-examination, that the signature was his writing, and not his father's. In his re-examination he was asked on whose behalf he acted in the transaction with the defendant.

Wilde, Serjt., objected.—There is now a perfect contract before us, and we must look at the face of it to see by whom it was made.

BEST, C. J.—Such questions are asked constantly in the city, in the cases of contracts signed by brokers.

Wilde, Serjt.—In those cases the circumstance of its being a broker who makes the contract, makes a difference, because a broker cannot act as a principal. If this course of proceeding is allowed, a party is turned into a witness who ought to be made a plaintiff.

BEST, C. J.—My brother *Wilde's* observations are entitled to great weight. The question comes very near the city cases, and is of considerable importance. I will therefore reserve the point (a).

Evidence was given of the printing being done, and of the defendant's refusal to accept the bill.

(a) In consequence of the result of the trial, any motion upon this subject became unnecessary.

1825.
 POPLERT
 v.
 STOCKDALE.

Wilde, Serjt.—A court of justice was never engaged in a more unseemly object than in enforcing a demand on account of one of the most scandalous and indecent works that ever issued from the press.

BEST, C. J.—I know nothing of this work; but you have stated enough to make me say, that I am bound to inquire into the nature of it, and see whether it is a thing that can properly be charged for.

Several of the numbers were handed up to his Lordship, which had advertisements printed on the outside covers, of the following description:—“The marriage ceremonies and intercourse of the sexes in all ages.” “Exhibits in parts 4, 5, and 6, the King, the Duchess of York, Prince Esterhazy, the Duke of Argyle,” &c.

His Lordship, upon this, remarked to *Serjt. Vaughan*—From what I have seen of this work, does it not contain the life of a prostitute, and the history of her amours with various persons?

Vaughan, Serjt.—It would be affectation to deny that such is the nature of the work.

BEST, C. J.—Then I have no hesitation in saying, that no one who assists in putting forth this work to the public is entitled to recover in any Court of Justice. He who lends himself to that which is contrary to the laws of the country, cannot complain of not being paid for lending himself to that criminal purpose. Every servant, to the lowest engaged in such a transaction, is prevented from receiving compensation. There is a double object in this infamous publication. 1st. The enticing of youth; and 2dly, The extorting money. I am only sorry that I have no power to punish the parties concerned. All I can say is, that I will not consent that either of them shall recover

any thing in a British Court of Law. I have only further to observe, that I will call the plaintiff.

1825.
POPLETT
v.
STOCKDALE.

Vaughan, Serjt. — Does your Lordship think that this objection lies in the mouth of Mr. Stockdale — that late repentant sinner?

BEST, C. J. — Yes; in the mouth of any body. Lord KENYON, who was in the habit of expressing himself strongly, said, that he would never take an account between two men, whose business was transacted upon Hounslow Heath; and I am of opinion, that this is a very similar transaction.

Nonsuit.

Vaughan, Serjt., and *Chitty*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Webb*, and *Neels*.]

In the case of *Law v. Hodson*, 11 Ea. 300, it was held, that the plaintiff could not recover the price of a quantity of bricks sold by him to the defendant, because they were of less dimensions than are required by the stat. 17 Geo. 3, c. 42. And it was decided in the case of *Girarday v. Richardson*, 1 Esp. N. P. C. 13, that a plaintiff could not recover for lodgings,

knowingly let to the defendant for the purposes of her prostitution. And in *Howard v. Hedges*, 1 Selw. L. N. P. 68, that the keeper of a house of ill fame could not recover against a woman of the town, for board and lodging furnished to her. See also the case of *Stockdale v. Onwhyn*, ante, p. 163. and the notes to that case.

TILK v. PARSONS.

Dec. 8th.

SLANDER. The declaration stated, that the plaintiff carried on the trade of a baker, and that the defendant spoke of him words imputing that he had been fined

In an action for slanderous words charging a baker with using adulterated flour, if the

declaration allege as special damage that several persons (naming them) discontinued to take his bread. The person of whom they used to buy it cannot be asked what reason they gave for ceasing to take it any longer; but the persons themselves must be called to prove their motives.

1825.
TILK
v.
PARSONS.

400*l.* for using Plaster of Paris in his bread; and proceeded to state, as special damage, that several persons named, discontinued buying his bread.

The words were proved, and to make out the special damage, a person was called, who kept a shop at which the plaintiff's bread was sold; and having proved that certain persons whom he was in the habit of serving with the plaintiff's bread, refused to purchase it any longer—

The plaintiff's counsel wished to ask him whether they assigned any and what reason for such refusal.

BEST, C. J.—That question cannot be asked. You might call these customers, who are named in the declaration, and might ask them on their oaths, what was the reason of their not continuing to buy the plaintiff's bread; but I am clearly of opinion, that what they said to the salesman is not evidence.

Verdict for the plaintiff. — Damages, 20*l.*

Vaughan and *Taddy*, Serjts., and *Campbell*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Caslon*, and *Fielder*.]

1825.

Adjourned Sitings in London, after Michaelmas Term, 1825.

ENDERBY and Another v. CORDER.

Dec. 10th.

ASSUMPSIT on two promissory notes, dated 6th June, 1822, at four months, expressed to have been given "on account of John Thompson's estate. Plea—The general issue.

It appeared, that, on the 4th May, 1822, a commission of bankrupt was issued out against John Thompson; and on the 7th of that month, a written agreement was entered into between the defendant and the creditors of Thompson; by which the defendant and one Cleasby were appointed trustees of Thompson's estate, and the funds were to be vested in them; the defendant was to give his promissory notes for the amount of 5*l.* in the pound, and the commission was not to proceed.

There was a clause in the agreement, that in case any of the creditors having debts above 10*l.*, should refuse to come in within fourteen days from its date, the agreement should be void. This agreement was signed by the plaintiffs and the rest of the creditors, with the exception of a person named Garforth, a creditor to the amount of 150*l.* A deed was afterwards prepared, which embodied the terms of the agreement, with the exception of the clause respecting the effect of all the creditors not coming into the arrangement. It also contained a release, but set out the circumstances as a consideration. This deed was signed by the plaintiffs, and several others of the creditors.

Garforth proved, that he refused to come into the ar-

An agreement was made, by which the funds of a bankrupt's estate were assigned to a certain person, who was to secure 5*s.* in the pound to all the creditors; in consequence of which the proceedings under a commission which had issued were to be stayed. The agreement contained a clause, making the arrangement void if any creditor, whose debt was above 10*l.*, should refuse to come in. A deed was afterwards prepared, in which however a similar clause was not inserted. The deed contained a release, but recited the circumstances as a consideration. Held, that promissory notes, given, in pursuance of the agreement, to a creditor who executed the deed, could not

be sued upon by him, it appearing that the commission went on, and the funds were withdrawn from the hands of the maker of the notes, in consequence of the refusal of one of the creditors to execute the deed, and enter into the arrangement.

1825.
 ENDERBY
 v.
 CORDER.

rangement, and that the agreement was tendered to him for signature, but not the deed.

When Garforth's refusal to accept the composition was known, the defendant gave notice to the attorney who was getting the deed executed, not to proceed any further; but this was after the plaintiffs had executed it, and these notes had been delivered to them. The commission of bankrupt was afterwards prosecuted; and, in consequence, the defendant paid over the funds he had received to the messenger under the commission, which were afterwards paid over to the solicitor of the assignees.

Taddy and Wilde, Serjts. for the defendant, contended, that, upon this state of facts the plaintiff was not entitled to recover. The agreement, and the terms of the notes, shew that the consideration has failed. If the notes had got into the hands of a third person on a *bond fide* consideration, we should have no defence; but now, as against the plaintiff, we have a very good one. It is impossible to collect all the creditors together. It has been solemnly decided, that if a fine be levied, and a recovery is suffered half a year after, or more, it is to be considered as all one transaction. How much more should it be so in the present case, as applied to the agreement and the deed? The commission has actually gone on, and the funds have been withdrawn from the defendant's hands; and if the plaintiff recovers now, he will have the money in two ways. The deed is not made void, because it is not to be executed by the creditors, except they all agree. The parties went on executing the deed, on the supposition that the whole of the creditors would execute the agreement. The deed was not to come into operation, until the clause in the agreement should be performed.

Vaughan, Serjt. *contra*.—This can be no legal bar. We are here to look only at the deed; unless we can recover now, we have no remedy at all. The deed is a perfect

release of all claim on the part of the plaintiffs. If it is said, that they are remitted to their original claim; to that I answer, that if they were to bring an action, the deed might be pleaded as a release. The consideration has not failed—it was that they should release the estate—they have done so, and the debt is extinguished. The agreement, in point of law, is merged in the deed as the more solemn instrument. They should have had a similar clause in the deed to that in the agreement, and the deed should have been tendered to Garforth. The case of *Holmes v. Love*, 3 B. & C. 243, decides, that they should shew that both the agreement and the deed were tendered for execution. If the deed is to be binding upon the plaintiff, surely it ought to be binding upon the defendant also. The deed witnesses, that in consideration of the assignment made to the defendant, and the promissory notes given by him, &c. the creditors, parties thereto, do severally and respectively remise, release, and for ever quit claim to the bankrupt. Now, this is not prospective.

BEST, C. J. in his summing up, said, it appears, that these creditors by the deed released the bankrupt; but the question will be, whether that release is not controlled by the other parts of the deed. One question will be, whether the execution of the deed was improperly stopped by the defendant; for if he changed his mind, and did not use due diligence to get the creditors to execute, it will be his own fault, and he cannot set it up now as a defence. I agree with the case decided in the Court of King's Bench; but all that is there laid down is, that it is not enough to produce a deed, and say, we do not find the signature of the creditor; but you must go further and shew, that he actually refused to execute it. If you think that no means which the defendant could have used would have induced Mr. Garforth to relinquish his refusal, then I am of opinion, that the defendant is entitled to a verdict. I am not aware of any case decided on this precise ques-

1825.
ENDERBY
v.
CORDER.

1825.
ENDERBY
v.
CORDER.

tion. If the defendant has acted *bond fide*, he has a good defence in point of morality; for the property has been taken from him on an event contemplated by all parties. No doubt the agreement is merged in the deed. My present opinion is, that, looking at the whole of the deed, the other parts of it control the release. I am also of opinion, that the deed and the giving of the notes must be taken to be one transaction. The understanding of the parties must have been, that the notes were not to be acted upon, unless the defendant retained possession of the funds. No man alive contemplated that the defendant was to pay out of his own pocket.

The jury, however, found for the plaintiffs, saying, that they thought the defendant had not used due diligence in endeavouring to get Mr. Garforth to execute the deed.

IN the ensuing Hilary Term, *Taddy*, Serjt. obtained a rule *nisi* for a new trial; which, after argument, the Court made absolute, considering that the Lord Chief Justice was correct in his opinion at the trial, and that the verdict found for the plaintiffs was not satisfactory, under all the circumstances.

Vaughan, Serjt. and *Richards*, for the plaintiffs.

Taddy and *Wilde*, Serjts. for the defendant.

[Attornies—*Barendale T. & U.*, and *B. Lewis*.]

See the case of *Johnson v. Baker*, 4 B. & A. 440.

1825.

JOHNSON v. BAKER.

Dec. 13th.

ASSUMPSIT for goods sold. The defendant was the executor of a Mr. Whitehead, and the demand was for mourning furnished to the widow and family of the defendant's testator.

One of the testator's sons was called as a witness for the defendant. He admitted that he was entitled to a legacy under the will, and that he had not received it.

He was objected to on the part of the plaintiff, as an interested witness; because it was the object of his testimony to prevent the estate being charged, out of which his legacy was to be paid.

On the part of the defendant it was contended, that there was no objection to his testimony; as the executor, if compelled to pay the demand, must pay it with his own money, and could not claim it against the estate.

For the plaintiff it was replied, that the argument used would only apply in the case of a contest between creditors, and not where, as in this case, there were ample funds to pay all demands on the estate. It was also urged, that this demand might come under the description of funeral expenses, which an executor was bound to pay.

BEST, C. J. was of opinion that it was not a funeral expense, and that the executor could not claim against the estate, if compelled to pay; and therefore he decided, that there was nothing in the objection.

Verdict for the defendant.

Lee, for the plaintiff.

Comyn, for the defendant.

[Attornies—*Steel & Nicol*, and *Sheppard, T. & L.*]

A demand for mourning furnished to the widow and family of a deceased person, is not a "funeral expence," and cannot be claimed against his estate by the executor if he gives the order, and by consequence a legatee who has not received his legacy, is a competent witness on the part of the executor, in an action brought against him for the recovery of such demand.

1825.

Dec. 13th.

CROWDER v. AUSTIN.

The owner of a horse sold by auction, has no right, under the usual condition of a sale, that "the highest bidder shall be the purchaser," to employ any person to bid for him for the purpose of enhancing the price; and if he do so, he cannot recover the purchase money from the buyer.

ASSUMPSIT for the price of a horse. The horse was sold by public auction, at which the plaintiff's groom attended and bid. Another person, not connected with the plaintiff, also bid; but his bidding did not go beyond the sum of twenty-three guineas. The horse was knocked down to the defendant at twenty-nine guineas. The printed conditions of sale were given in evidence, from which it appeared that the highest bidder was to be the purchaser.

BEST, C. J., upon this, inquired of *Spankie*, Serjt. if he thought the action could be maintained.

Spankie, Serjt. — Yes, my Lord; I think there is no puffing to impose upon the purchaser.

BEST, C. J. — I am clearly of opinion, that the action cannot be maintained. I have long been surprised that the objection has never been taken. A man goes to a sale, and is told that if he is the highest bidder he shall have the article. He bids a certain sum, and a person (employed by the seller) whom he does not know, attends and puffs against him, and in consequence of that, he is compelled to pay a much larger price than he would otherwise have paid. Is not this a gross fraud? I am prepared to nonsuit the plaintiff.

Spankie, Serjt. — There is a case which decides, that a seller has a right to have one person to bid for him at the sale, if he does not do it in order to impose.

BEST, C. J. — I agree that he has such right; but then he must declare it by the conditions of sale.

Spankie, Serjt., then proved, by the evidence of the

auCTIONEER, that the defendant was in the habit of attending at sales of horses, and that he knew that the plaintiff's groom was present at the sale in question.

1825.
 CROWDER
 v.
 AUSTIN.

BEST, C. J. — I am of opinion that the plaintiff cannot recover in this action. The conditions of sale are, that the highest bidder is to be the buyer; and no leave is reserved for the employment, either openly or covertly, of any person to bid for the seller. I am of opinion, that a seller acts in opposition to the conditions of sale, if he employs a person to bid, for the purpose of enhancing the price. In this case the other person at the sale did not, in his bidding, go near the ultimate sum. It is impossible, under these circumstances, to say that the price of twenty-nine guineas was the highest price contemplated by the conditions: for the defendant, under them, was entitled to have the horse at the next highest bidding to that of the only fair bidder. I am of opinion, that the plaintiff must be called.

Nonsuit.

Spankie, Serjt., and *P. Kelly*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Crowder & M.*, and *Harman*.]

IN the ensuing Hilary Term, *Wilde*, Serjt., moved to set aside the nonsuit; and argued to the following effect. A Court of Equity would enforce such a contract; and as a matter of law, it is not avoided by such a proceeding as is called puffing. Puffing is not, in point of law, by itself a fraud upon a buyer, but may become so if coupled with other circumstances. If a practice is notorious, and well understood, no buyer is deceived by it, and though an old case may have decided, that, some years ago, it was unknown, and therefore fraudulent, it does not follow that it must be so now. It should have been left to the jury to

1825.
 CROWDER
 v.
 AUSTIN.

say whether, in this case, the party was taken by surprise. As to the condition that the highest bidder shall be the purchaser, the statute of 17 G. 3, cap. 50, § 10, gives a bonus, by a reduction of *auction duty*, to an owner of an estate, who becomes the purchaser of it ; which would not have been done if the legislature had thought it fraudulent for a man to bid for his own estate. The case of *Howard v. Castle*, 6 T. R. 642, which is called a leading case on the subject of puffing, has been frequently adverted to since, and its effect stated to be not, that the attendance of a puffer on the part of the owner, avoided the sale ; but that because there were no other bidders, the sale was no better than a mock auction. Lord ROSSLYN, in *Connelly v. Parsons*, 3 Ves. Junr. 625, in a note to the case of *Bramley v. Alt*, refers to a case of *Berwell v. Christie*, Cowper, 395, and observes, that “ the acts of Parliament imposing a duty on the sales of estates by auction, go upon its being a usual and a fair thing for the owner to bid ; ” and in the same case, his Lordship said, that he felt vast difficulty in compassing the reasoning that a person does not follow his own judgment because other persons bid ; and that the judgment of one person is deluded and influenced by the biddings of others. In the case of *Bramley v. Alt*, Lord ALVANLEY, then Master of the Rolls, concurred with Lord ROSSLYN, and considered the case of *Howard v. Castle* only as a decision, that where all the bidders, except the purchaser, are puffers, the sale shall be void. The circumstance of a practice being generally known, excludes the necessity of giving any personal notice. A party is bound to know the practice, if he is in that course of dealing. What is done, is done to protect the property, and is not, like swindling, bad *per se*. The practice, also, is always allowed in the case of sales by trustees for infants.

BURROUGH, J. — Is there not a difference between a sale by trustees in Chancery, and a sale at common law.

Wilde, Serjt. — That is only illustration; the decisions go upon the general principle.

1825.
CROWDER
v.
AUSTIN.

BEST, C. J. — My own opinion remains what it was at *Nisi Prius*; but it is a question of very general importance; and it is fit, before we lay down a rule which may affect every sale in the kingdom, that we should have the matter argued and considered. Not that I think that any judge will be found eventually to sanction the practice.

PARK, J. — I, for one, do not think that a rule ought to be granted: but if any single judge is of a contrary opinion, the matter ought to be discussed. The opinion of Lord MANSFIELD is not a mere *dictum*, but a long elaborate judgment; and he was followed by Lord KENYON, in a case of *Blachford v. Preston*, 8 T. R. 93 & 95.

BURROUGH, J., expressed himself of the same opinion.

GAZELEE, J. — I do not feel prepared, on the sudden, to decide a case of so great importance, and particularly as there have been differences of opinion on the point.

A rule *nisi* was accordingly granted; which, when it came on for argument, was not supported by *Wilde*, Serjt., and therefore the Court ordered it to be

Discharged.

SALMON v. WARD.

Dec. 13th.

ASSUMPSIT on a warranty of a horse. No direct evidence was given of any thing that passed at the time when

the plaintiff and defendant, in which the plaintiff writes, "You well remember that you represented the horse to me as a five year old," &c. to which the defendant answers, "The horse is as I represented it," are sufficient evidence from which the jury may infer that a warranty was given at the time of the sale; and it is not necessary to give other proof of what actually passed when the contract was made.

In an action on the warranty of a horse, letters passing between

1825.
 SALMON
 v.
 WARD.

the contract was made ; but some letters were put in, one written by the plaintiff, which contained these words : " You well remember that you represented the horse to me as a five year old," &c. ; and one from the defendant in answer, which stated, *inter alia*, " The horse is as I represented it."

Spankie, Serjt. for the defendant. — They have not proved the warranty in the declaration, which is express. They must shew a distinct warranty, and not piece it out by a parcel of letters. Warranty, means a warranty at the time of sale.

BEST, C. J.—The question is, whether I and the jury can collect that a warranty took place. I quite agree, that there is a difference between a warranty and a representation; because, a representation must be known to be wrong. No particular words are necessary to constitute a warranty. If it were so, there would be more tricks in horse causes than there are at present. If a man says, this horse is sound, that is a warranty. The plaintiff in his letter, says, " you remember, you represented the horse to me as a five year old." To which the defendant's answer is, " the horse is as I represented it." Now, if the jury find that this occurred at the time of the sale, and without any qualification, then I am of opinion, that it is a warranty. If it occurred before, or if it was qualified, then it must be taken to be a representation, and not a warranty. His Lordship then left the question to the jury, telling them, that if they found that the defendant at the sale gave an undertaking to the effect mentioned in the letters, then in his opinion, such undertaking was a warranty.

Verdict for the plaintiff.

Vaughan, Serjt., and *Abraham*, for the plaintiff.

Spankie, Serjt. for the defendant.

[Attornies—*Heming & B.*, and *Steecher & D.*]

**BLEASBY and Another, Assignees of BYERS, a Bankrupt,
v. CROSSLEY and Others.**

1825.

Dec. 14th.

ASSUMPSIT for money had and received, to the use of the plaintiffs as assignees.

In order to prove an act of bankruptcy, the bankrupt's porter was called, who stated, that, in the month of August, 1824, a person of the name of Clarke, called at his master's house, and asked if his master was within, and desired that he might be told that Jackson's bill was dishonoured, and that he (Clarke) wanted to see him; that the witness informed his master, who desired him to say that he was not in town; that upon this message being delivered to Clarke, he disputed the witness's word, and went up stairs towards the drawing-room in which the bankrupt was; and the bankrupt made his escape from the drawing-room, and went into a bed-room up another flight of stairs; in consequence of which, Clarke did not see him.

To prove the petitioning creditor's debt, a witness was called, who stated, that the bankrupt, on the 19th of July, came to Mr. Smith, the petitioning creditor, and obtained from him his check for 100*l.* to take up a bill which was coming due on the 20th. But the witness added, that the bankrupt gave Smith in return his own check to the same amount.

It appeared, that Messrs. Sikes & Co. were the bankers of Byers, and that the check in question had their name written across it. A clerk in Sir Peter Pole's house, on whom it was drawn, proved, that they would not, under those circumstances, have paid it to any one but Sikes & Co. The clerk to Sikes & Co. who was present at the trial, was not able to prove from any entries in his own hand-writing, that the check was paid, or that Byers had credit for it at the time when it was received. It was produced by the plaintiffs, the assignees, Smith (the petitioning creditor and drawer of it) being one of them.

If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him.

If one lend another a check for 100*l.*, such check is not evidence of a good petitioning creditor's debt, unless it be proved that it was paid.

1825.
 BLEASBY
 v.
 CROSSLEY.

It was contended by *Vaughan*, Serjt. that the circumstances of the name of Sikes & Co. being written across it, and its coming out of the hands of the plaintiffs, were *prima facie* evidence of its having been taken up and paid.

BEST, C. J.—You must shew that, on the day on which the check is dated, Byers had credit with Sikes & Co. to the amount of 100*l.*, or that it was paid.

Cross, Serjt. instanced the case of an acceptance, which had got back into the hands of the acceptor.

BEST, C. J.—There is no doubt as to an acceptance delivered out, and afterwards got back.

Cross, Serjt.—That is precisely our case. We shew a delivery of the check, and that it is back again in our hands as if satisfied; and that is *prima facie* evidence of payment, and makes it necessary for the other side to shew something improper in the getting it back, or that in fact it was never paid.

Stephen.—Checks, according to the London practice, are money; and the check in question must be taken to be so, unless the contrary is shewn.

BEST, C. J.—I will not stop the cause, but will give leave for a motion to the Court.

His Lordship left it to the jury to say, whether Byers considered Clarke to be a creditor; and the jury found that he did.

Verdict for the plaintiffs.

Vaughan and *Cross*, Serjts. and *Stephen*, for the plaintiffs.

Spankie, Serjt. and *Wightman*, for the defendants.

[Attornies—*Chester*, and *Milne & Parry*.]

In the ensuing Hilary Term, *Wilde*, Serjt. obtained a rule nisi for entering a nonsuit, in pursuance of the leave given at the trial; which rule, after argument, the Court made absolute; being of opinion, that although the act of bankruptcy was sufficient, there was not proof of a petitioning creditor's debt, because it did not appear, from the evidence, that the check had ever been paid.

1825.

BLEASBY

CROSSLEY.

SNOW and Others v. PEACOCK and Others.

Dec. 16th.

TROVER for a Bank of England note for 500*l*. Plea—General issue.

The plaintiffs were bankers in London, and the defendants carried on the same business at Sleaford in Lincolnshire, having also a branch bank at Bourne in the same county.

A clerk from the office of the auditor of public accounts, produced a dividend warrant; and a clerk of the plaintiffs proved, that the dividend warrant produced had been paid to their house on the 7th of September, 1824, by a customer of the name of Lake;—that it was given on the next day to a porter of the house, who had been in his situation a great many years, to take it to the Bank of England, in order to get the money for it;—that the porter returned to the plaintiff's without the produce, and said that he had been robbed in Fleet Street; and also that the porter had died three or four months before the trial. This witness further stated, that it was the practice of London bankers never to change a note for a stranger, without first making some inquiries.

If a banker in a small market town change a 500*l*. bank of England note for a stranger, without any further inquiry than merely asking his name, he is liable in trover to a party from whose possession such note had been unlawfully obtained; and the question in such case is not, whether there was an *honest* holding on the part of the defendant, but whether, under the circumstances, there was a want of *due caution*.

The plaintiff, however, in such case, must shew that he has done every thing which in reason he ought.

A dividend warrant was paid into a bankers' by a customer. The bankers sent it by a porter of the house to the Bank of England, to get cash for it, he returned without the money, saying he had been robbed of it. Held, (the porter himself being dead) that proof of those facts was sufficient evidence of possession on the part of the bankers, to enable them to maintain trover for a 500*l*. note, part of the money, against a party into whose hands it had come, under circumstances which would not entitle him to retain possession of it.

1825.
SNOW
PEACOCK.

One of the clerks in the Bank of England proved, that on the 8th of September, 1824, he paid the dividend warrant produced, and mentioned the dates and numbers of the notes with which he paid it, among which, were the date and number of the note in question. This witness added, that the Bank of England require the name and address of the party presenting a note, before they give change for it.

A clerk of the defendants, who was in their bank at Bourne, proved, that Bourne was a small market-town; and that on the 13th of April, 1825, at 11 o'clock in the morning, about two hours after the arrival of the London mail, a person respectably dressed, and apparently about sixty years of age, came into the bank, and asked him to change a Bank of England note for 500*l*.—that he asked first to have it changed for smaller Bank of England notes; but, on being told that it was not the practice of the house to give change in that way, consented to take the notes of the Sleaford Bank;—that he had no previous knowledge of the man, and had never seen him since;—that he sent the note by the next night's post to the defendant's correspondents in London, Messrs. Hoare, Barnett & Co. in account with whom the defendants had credit for it; and that it was only one night's post from Bourne to London. On his cross-examination he said, that it was the defendant's course of business to issue their own notes for value;—that he asked the man his name, and received for answer, that it was Edwards, and that there were a number of fairs held in adjacent parts about the time in question. On his re-examination he admitted, that generally in the country 500*l*. notes are only in circulation amongst bankers. And in answer to questions from the jury, he acknowledged, that, although he had been in the defendant's employ for a period of eleven years, he had never before changed a larger note than one for 100*l*.

It was proved, that, in September, 1824, three hundred placards giving notice of the robbery, were stuck up in

London and the vicinity, and between seventy and eighty hand-bills were distributed amongst the bankers in the city. The loss of the note was also advertized in the Morning Advertiser newspaper, and in "The Hue and Cry."

1825.
 SNOW
 PEACOCK.

The wife of the printer of the latter paper, proved that it was sent by order of Government to various magistrates and others, and that fifty were generally sent into the county of Lincoln.

The defendant's clerk was again called, and stated that the defendants did not take in the Hue and Cry at their banking houses; but he admitted that one of them, Mr. Handley, acted as a magistrate for the Bourne division.

Spankie, Serjt. objected.—This is not proof of Mr. H.'s being a magistrate.

BEST, C. J.—I think, proof that a man acts as a magistrate is proof of his being so in any case.

Spankie, Serjt.—But some men are magistrates who never act at all.

BEST, C. J.—Then you must produce the commission, because you can have no other evidence.

A clerk in the Bank of England then proved, that on the 8th September, 1824, application was made at the Bank to stop the note in question; and that if after that day inquiry had been made by any person, information of the fact might have been obtained.

For the plaintiffs, it was argued, that the defendants, under the circumstances, ought not to have changed the note, but should have made inquiries on the subject; they had not exercised proper caution, considering the amount of the note, and the circumstance of the place where it was changed being a small market-town. London bank-

1825.
 SNOW
 v.
 PEACOCK.


ers, it was said, will not change a note for a person whom they do not know; and, *a fortiori*, a country banker ought to make inquiries. The authorities cited were *Solomons v. The Bank of England*, 13 East, 135; *Gill v. Cubitts* (a), 5 Dow. & Ry. 324; and *Egan v. Threllfall*, mentioned in a note to that case.

Spankie, Serjt. for the defendants.—This action cannot be maintained by the present plaintiffs. They declare on their possession in trover. The dividend warrant was put into their hands merely to receive the money for Lake, who was the real owner. Trover and trespass are very different. This note never reached their possession at all. There is no evidence how it was lost; it had disappeared for seven months; it never came into their possession. They have not established any property, direct or indirect. They have not shewn any felony committed. They must shew general or special property, and that the note continued in their possession up to the time of the conversion.

BEST, C. J.—There is no occasion to prove the commission of a felony, but only that the note was improperly got from the plaintiffs' possession, if they were entitled to it. The porter must either have been robbed, or have embezzled it himself. Admitting that it never was in their possession, yet trover is maintainable if the party has property. The possession of my servant is my possession. This appears from the case of the butler who was convicted of stealing his master's plate while it was in his own custody. Constructive possession will maintain trover. Bankers are in the habit of receiving plate for safe custody, but the property is in the customer who deposits it, and the banker cannot touch it. But if I send money to him, or he receives it for me, it becomes his property; he is not bound to give me the identical notes he receives of me. And

(a) See *ante*, Vol. 1, pp. 163, and 487.

there is no form of action by which I could compel him to do so.

1825.

 SNOW
 v.
 PEACOCK.

Spankie, Serjt., then addressed the jury.—If you hold the defendants responsible, you will give a death wound to the circulation of bank notes. Bank notes are as cash, and cannot be followed. If not, no man could take one without making himself liable to an action. The plaintiffs are bound to shew not want of caution merely, but fraud and collusion. I agree with the case of *Gill v. Cubitts*; but there is a broad distinction between the case of a bank note and of a bill of exchange. A man does not take a bill as cash; but he discounts it, and is *pro tanto* a purchaser, and must look into the title of the person of whom he takes it, and must ascertain it at his peril. But this is not necessary in the case of a bank note. The Liverpool case is one of gross fraud; *crassa negligentia* is tantamount to fraud, on account of its consequences. It would have been nugatory to make a long string of inquiries, for the party might have easily answered them so as to deceive. Lord MANSFIELD, in *Miller v. Race*, 1 Burr. 452, says, “The whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts. Now, they are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes.” It is said, that the amount of the note changed ought to be taken into consideration, but that would be a loose, vague, and dangerous standard of estimation. It would depend upon a man’s idea of the value of money. A miser would have one idea, a spendthrift another, and a moderate man a third. A bank note is money, and is to pass without inquiry; and fraud and collusion must be clearly made out, to enable a party to reco-

1825.
 SNOW
 v.
 PRACOCK.

ver under the circumstances of this case. The Bank cannot compel a person to write his name on a note before they change it. The plaintiffs should have sent the printed bills to all the country bankers. There is no distinction between these defendants and the publican in *Miller v. Race*, for both were acting in the ordinary course of their business. As to the question of negligence, there were but two things for the defendants' clerk to do. The one was either to have nothing to do with the note, or ask a set of the most nugatory questions that were ever heard of. Besides, if he had asked questions, it would have shewn that his mind was alive to suspicion; and then he ought not to be satisfied with the answers he would receive. He must either have stopped the circulation of a Bank of England note, or have stopped the man who presented it for change. It is not incumbent on a party to do more than act *bond fide*. As to bills of exchange, the rule of *caveat emptor* applies. *Miller v. Race* decides, that a case like the present must be bottomed in fraud, and not decided upon a test which varies according to the character, feelings, and conditions of men. The note must have gone out of the plaintiffs' possession by circulation from hand to hand, before it was presented to the defendants, and the possession of the first *bond fide* holder would divest the possession of the plaintiffs. The note had been out seven months, and it cannot be presumed, that it never made its appearance till it was presented to the defendants, and that it never got into the hands of such a *bond fide* holder. All the cases cited are cases standing on their own circumstances of suspicion; but in this case the parties are all innocent; and which of them is most so? he who has been entrapped into the changing a note, or those who might have sent a printed notice of their loss to all the bankers in the country, if they had merely looked into the lists, and taken the trouble to find out their directions?

BEST, C. J., in his summing up, said, it appears to me

that the only safe rule in cases of this sort, is the rule which is laid down in *Gill v. Cubitt*, viz. to see whether all the parties have acted with due caution. 1st. Whether the plaintiffs have done all that could be reasonably expected of them; for if they have not, they cannot recover. And secondly, if they have, whether the defendants have done so too. As to sending the Hue and Cry, the witness said, that the publisher had not the power of sending it without an order from the police. There may be wise reasons for that, and it does not appear to have been done in any of the other cases. I will not submit the question to you on my brother *Spankie's* principle. The case of *Miller v. Race* does not touch this question. Lord MANSFIELD does not say, that it is necessary there should always be suspicion; but he argues on the particular facts of the case. The question of caution depends much upon the sum. The party's caution should increase with the amount of the note which he is called upon to change. A man may change a 20*l.* note without asking a single question; but would that be right as to one of several thousands. There is no doubt, that the defendants are most respectable persons. It is important to remember, that the man asked for change in Bank of England notes, but afterwards agreed to take those of the defendants' bank. Perhaps the circumstance of getting their own notes into circulation, and the little profit they would thereby acquire, might abate the degree of caution which they would have used under other circumstances. Questions should have been asked, and those questions continued, till suspicion was satisfied. One of the witnesses proved, that it is the practice of London bankers never to change a note for a stranger without first making inquiry. I think the plan adopted by the Bank itself is a very proper caution: but the Bank stand in the situation of a payer, and the country banker is a discounteer; and more caution is required in the case of the latter than the former. The question for your consideration is, whether the defendants in this case have used due caution or

1825.

Snow
v.
Pracock.

1825.
 SNOW
 v.
 PEACOCK.

not; that is, in other words, whether they took the note in the usual course of business; for the course of business must require, in the usual and ordinary manner of conducting it, a proper and reasonable degree of caution necessary to preserve the interests of trade.

The jury found for the plaintiffs, observing, at the same time, that no suspicion of unfairness could attach to the character of the defendants.

: *Vaughan* and *Bosanquet*, Serjts. and *S. M. Phillips*, for the plaintiffs.

Spankie, Serjt, and *Smirke*, for the defendants.

[Attornies—*Henson & D.*, and *Sandys & Son.*]

IN the ensuing Hilary Term, *Wilde*, Serjt. obtained a rule *nisi* for a new trial, which, after argument, was discharged. The Court being of opinion that the question had been properly left to the consideration of the jury, and that there was no reason for disturbing the verdict.

See the cases of *Peacock v. Greenstreet v. Carr*, 1 Camp. 551. *Rhodes*, Doug. 633. *Grant v. Wookey v. Pole*, Bart. 4 B. & A. 1, *Vaughan*, 3 Burr. 1516. *Egan v. and King, Esq. v. Milsome*, 2 *Threllfall*, 5 Dow. & Ry. 326. Camp. 5.

YRISARRI v. CLEMENT.

1825.

Dec. 18th.

ACTION for a libel in the Morning Chronicle newspaper. The declaration stated, that the plaintiff, before the time of committing the grievances complained of, had been and was appointed by certain persons exercising the powers or authority of government, in a certain republic or state in parts beyond the seas, to wit, in the *republic or state of Chili* in South America, to the office or station of Envoy Extraordinary and Minister Plenipotentiary from the said republic or state of Chili, to and at the Courts of Europe, and amongst others to the Court of this united kingdom; and that he had been, and was authorized, empowered, and directed by the said persons exercising, &c. to negotiate a loan or loans for the service of the said republic or state; and also that by virtue, and in exercise of the said power and authority he had entered into, made and concluded for and on the part of the said republic or state, a contract with certain persons, to wit, John Hullett and Charles Widder, for raising a certain loan of money, to wit, a loan for 100,000*l.* sterling money of this kingdom, for the service of the said republic or state, by the sale of certain *bonds or obligations*, to wit, bonds or obligations of and on the part of the government of the said republic or state, which said bonds or obligations had been and were signed by him as Envoy Extraordinary, &c. and had been and were issued by him to the said Messrs. Hullett and Co. and had been, and were sold and disposed of by and through their agency to divers subjects of this kingdom, as the buyers and purchasers thereof.

The declaration further stated, that, at the time, &c. one John Hullett, being one of the partners in the said

If a foreign state is recognized by this country, it is not necessary, to support an allegation which describes it as a state, to prove that it is in fact an existing state, but if it be not so recognized, then such proof becomes necessary, and may be admitted.

If a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state; and it makes no difference whether they formerly belonged to another country or not, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it.

A bond for foreign stock signed in Paris, but issued in England, does not require an English stamp.

A foreigner has no right to negotiate in England a loan for the use of a State, which has separated itself from, and is at war with one of England's allies (such State not being at the time recognized by England) without the permission of the English Government; and if a letter in an English newspaper merely animadvert, though in the strongest terms, upon the illegality of such a transaction, it is no libel; otherwise, if it go beyond that, and impute a moral fraud to the party engaged in it.

If in the inducement in a declaration in an action for a libel, two places are described as "States," and in the libel itself allusion is made to one, and the other is actually mentioned under the title of a "neighbouring State," it is not necessary that the plaintiff at the trial should prove, that either of them were in fact States.

1825.
 YRISARRI
 v.
 CLEMENT.

house or firm of Messrs. Hullett & Co. had been and was appointed by certain persons exercising the powers or authority of government in a certain other republic or state in parts beyond the seas, near or neighbouring to the before-mentioned republic or state of Chili, that is to say, in the republic or state of Buenos Ayres, Consul-General for the said republic or state in and towards this united kingdom.

The libel was then set out as having been published in the Morning Chronicle of and concerning the plaintiff, and of and concerning the matters aforesaid. The defendant pleaded, 1st. The general issue. And 2d. a justification; in support of which, however, from the absence of a witness, he did not give any evidence at the trial.

A witness, who described himself as under secretary of state at Chili, in 1818, proved, that, at that time, it consisted of three provinces, of which two and a half were under the direction of the government from which the plaintiff claimed his authority;—that such government was of a republican form, and had courts of justice in which laws were administered, and that it exercised a power of making laws, which were submitted to by the people of the country. On his cross-examination he admitted, that in the other half province, there was war between the king of Spain and those who had been his subjects, and had declared themselves independent.

An instrument was then offered in evidence, dated in October, 1818; it was signed by Don Bernardo O'Higgins, and Don Joachim Echeverias, the former as supreme director, and the latter as secretary of state for foreign affairs; it was also sealed with a seal, which the witness stated was used and adopted by the government of Chili.

Taddy, Serjt.—There is not sufficient evidence of Chili being a state. This seal is not such a seal as your Lordship can recognize as the seal of a state. It must have been recognized by competent authority. Your Lordship

can take judicial notice that, in treaties with this country, Chili has been mentioned as forming part of the dominions of the king of Spain.

1825.
YRISARRI
v.
CLEMENT.

BEST, C. J.—It occurs to me at present, that there is this distinction. If a foreign state is recognized by this country, it is not necessary to prove, that it is an existing state; but if it is not so recognized, such proof becomes necessary. There are hundreds in India, and elsewhere, that are existing states, though they are not recognized. I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have Courts of Justice, that is evidence of their being a state. We have had, certainly, some evidence here to day that these provinces formerly belonged to Spain; but it would be a strong thing to say, that because they once belonged, therefore they must always belong. We have recognized lately some of these States. It makes no difference whether they formerly belonged to Spain, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it. This is my present opinion; but I will give my brother *Taddy* leave to move the Court upon the subject.

The instrument was then read. It recited the necessity of sending a public man to Great Britain, and appointed the plaintiff as Envoy Extraordinary and Minister Plenipotentiary. A similar document was put in, appointing the plaintiff Envoy, &c. to all the kingdoms of the old world. Another instrument was then put in, signed by the same parties, and dated 29th October, 1818, which authorized the plaintiff to raise money for the State, under such terms as he should think proper.

A set of special instructions, dated 4th December, 1818, also signed by the same persons, were put in and read.

1825.
YRISARRI
v.
CLEMENT.

One of the articles contained a direction that the plaintiff should take care to oppose the Spanish Ministers, by availing himself of the public papers. A contract with Hullett and Co. for the loan, and a mortgage deed, pledging the revenues of Chili, signed by the plaintiff, which had been deposited at the Bank of England, were also put in and read. One of the bonds given to secure the loan was then put in, as a specimen of the rest. It was in the English language, and was proved to have been signed by the plaintiff at Paris, and issued by him to Hullett and Co., who resided in London, and sold by them under their contract.

Evidence was then adduced of the appointment of Mr. Hullett as Consul for Buenos Ayres, and also of the situation of affairs at that place in 1818. It was similar to that given with respect to the plaintiff and Chili, and was met by a similar objection, which was followed by a similar determination, and accompanied by a similar leave to move the Court upon the point.

The usual certificate from the stamp-office was put in, to prove that the defendant was proprietor of the *Morning Chronicle*.

The libel was then read. It was in the paper of the 23d July, 1825. It mentioned Mr. Hullett's appointment as Consul General to England, and charged him with saddling the republic of Chili (calling it by the name of a *neighbouring state*) with a debt of a million of pounds, for his own benefit; and then went on to accuse the plaintiff, by the name of "The Creole Spaniard," of acting the part of "Plenipo to the Stock Exchange in that affair with Mr. Hullett." There were other accusations in the libel against the plaintiff, which imputed fraud to him in the application of the money raised for the loan.

Taddy, Serjt.—There are two allegations which have not been proved; the first is, that which relates to the plaintiff's being Envoy, and Mr. Hullett Consul: there is

no evidence of either of them having acted in those capacities as and *towards this united kingdom*;—they should have shewn an acceptance by a communication with our Government.

1825.
YRISARRI
v.
CLEMENT.

BEST, C. J.—It is only stated that they were *appointed*, not that they *were*; and they were appointed whether recognized or not. I am of opinion that there is nothing in this objection.

Taddy, Serjt.—The other allegation which is not proved is, that which states that certain *bonds or obligations* were signed by the plaintiff, &c. The bond which was produced as a specimen, was without any English stamp, which it ought to have, inasmuch as it was issued in this country, and is a security for money which is available in this country, and is marketable there; it is meant to circulate in this country, and have its effect in it, and money has in point of fact been actually raised upon it;—and it describes the plaintiff as being resident in London.

BEST, C. J.—It is signed by the plaintiff as attorney for the state of Chili, and it is operative only in Chili. I am inclined to think that it does not require a stamp.

Spankie, Serjt.—It is a receipt for money.

BEST, C. J.—I will not stop the cause, but will give leave for a motion to the Court upon the point. If it bound any body in this country, it would require a stamp; but it seems to me that it does not.

Taddy, Serjt. then objected generally to the plaintiff's right to recover. The paragraph complained of in this case, relates to an illegal transaction; and as it only attempts to decry the characters of those engaged in such transaction, can it, I would ask, be considered as a libel?

1825.
 YRISARRI
 v.
 CLEMENT.

The transaction is clearly illegal, for no loan of this kind can be negotiated here, without the authority or permission of our Government.

BEST, C. J.—I have no hesitation in acceding to the proposition, that the transaction was illegal. No foreigner has a right to act as this plaintiff has acted without the permission of our Government; because such a transaction might have involved us in a war with Spain. And if the plaintiff had made any demand, and claimed any right, I should have nonsuited him. I gave a similar opinion in the case of the Greek loan, and my opinion was confirmed by the Court (a). If that which is charged as being a libel had consisted merely of observations as to the extreme absurdity and illegality of such transactions, though such observations had been couched in the strongest terms; yet if they were expressed honestly, I should have no hesitation in saying that the action could not be maintained. But it goes beyond that, and imputes to the plaintiff the commission of a moral fraud; and for such an imputation, I am of opinion that he is entitled to recover.

Verdict for the plaintiff.—Damages, 400*l.*, subject to a motion to enter a nonsuit.

Vaughan, Serjt., *Tindal*, and *Lysley*, for the plaintiff.

Taddy and *Spankie*, Serjts., for the defendants.

[Attornies—*Crossland*, and *James & W.*]

Jan. 23rd.

ON the first day of the ensuing Hilary Term, *Taddy*, Serjt. moved for a nonsuit pursuant to the leave given, on the ground that the averment had not been proved, which described Chili as being a republic or *state*. He also moved for a new trial on the following grounds: *first*, that the bond produced at the trial, though it was signed in

(a) *Dewitts v. Hendrick*, 2 Bing. 314.

Paris, because it was issued in England, required an English stamp, and without such stamp, could not be called a bond. And *secondly*, that the transaction being illegal, the plaintiff was not entitled to recover damages.

1825.
YRISARRI.
v.
CLEMENT.

The Court granted a rule *nisi* for a nonsuit on the first point, and a rule for a new trial on the third, but refused the application on the second, as to the necessity of the bond being stamped.

These rules came on to be argued in the course of the same Term, and the Court said, that it was not necessary to give any opinion upon the question, whether Chili had been proved to be a state or not; because as it was so called in the libel, that was an admission on the part of the defendant, which rendered it unnecessary to give any proof upon the subject. With respect to the effect of the illegality of the negociation of the loan upon the plaintiff's right to recover, they thought that the opinion of the Chief Justice, which he gave at the trial, was correct. But they decided on another ground, viz. the incorrectness of some material innuendoes, which was not adverted to at *Nisi Prius*, and therefore made the rule absolute for a new trial. *February*

OXFORD SUMMER CIRCUIT.

1825.

BEFORE MR. JUSTICE BURROUGH & MR. BARON GARROW.

OXFORD ASSIZES.

July 14th.

REX v. JAMES OGILVIE.

If goods be laid in an indictment as the property of A. W. G. Esquire, the addition is not material; and if he is not an esquire, it is no ground for an acquittal.

THE prisoner was indicted for stealing two silver spoons, which were laid to be the property of Andrew William Gother, *Esquire*.

The facts were clearly made out; but Mr. Gother stated on his cross examination, that he held no office which gave him the rank of esquire, (he being a gentleman commoner of St. John's College), nor was he so by the king's grant, nor by being the eldest son of a knight.

Shepherd objected, that the property was laid in Andrew William Gother, *Esquire*: and so far from that being proved, it was shewn that the gentleman whose property the articles were, was not an esquire; which was, he contended, a fatal variance.

BURROUGH, J. overruled the objection, and held, that the addition of esquire to the name of the person in whom the property was laid, was mere surplusage, and immaterial.

Verdict—Guilty.

Cross, for the prosecution.

Shepherd, for the prisoner.

[Attornies— ———, and ———]

WILKINS v. WELLS.

July 14th.

ASSUMPSIT to recover 20*l.* money lent. Pleas—General issue; and a set off for board and lodging of the plaintiff's son.

It appeared that the plaintiff was the butler of Magdalen college, and the defendant a hatter in the city of Oxford; and that the plaintiff wishing to place his son as an apprentice to the defendant, it was verbally agreed between them, that the plaintiff's son should go a month on liking, and if the master and intended apprentice suited each other, indentures of apprenticeship were to be executed, and a premium of 60*l.* paid. The lad went on liking, and after he had been at the defendant's, who boarded, lodged him, and employed him in his business of a hatter for several months, the defendant asked the plaintiff to advance him 20*l.*, which he did, (this being the sum in question). The lad stayed in the defendant's house, and worked in his business for a little more than a year and a quarter, when the defendant turned him away, and refused to receive him, when sent back again by his father. No indentures of apprenticeship were ever executed.

If a person take a lad a month on liking, with the intention of his being bound as an apprentice, if he and the lad suit one another, and the lad stay several months without any indenture being executed. If no fresh agreement were entered into, he is not entitled to charge for the board and lodging of the lad whom he employed in his trade, and by consequence he is not entitled to set it off in an action by the lad's father for money lent.

Jervis, for the defendant, contended, that, under these circumstances, his client was entitled to set off the board and lodging of the plaintiff's son against the 20*l.* advanced, the former being of much greater value than 20*l.*; as, after the month of liking was expired, the plaintiff not then causing indentures to be executed, he was liable to pay for the board and lodging of the lad. It was, no doubt, to be said, that the defendant had his services, but the services of a lad of this sort were of no value. Every one knew, that in a seven years' apprenticeship the last years were the only ones of value to the master.

GARROW, B.—This is a momentous question for the rising generation, if the defence has the slightest foundation. This lad was intended to have been placed as an

1825.
 WILKINS
 v.
 WELLS.

apprentice to the defendant, and went on what is called liking for a month. At the end of that month no indentures are executed, and no fresh arrangement come to, but the lad continues to stay with the defendant as before. No agreement was entered into, that the plaintiff should pay for his board, and nothing was said on the subject; and when the 20*l.* was advanced it was merely as an ordinary loan. I think there is no ground for any set off, and must advise the jury to find for the plaintiff.

Verdict for the plaintiff.

Curwood and Wright, for the plaintiff.

Jervis, for the defendant.

[Attornies—*King*, and ——.]

WORCESTER ASSIZES.

July 18*th*.

If three defendants have jointly imprisoned the plaintiff, the declaration of one of the defendants, made some weeks after, in the absence of the others, tending to shew that the imprisonment arose from malice, is admissible in evidence, in an action for false imprisonment brought against all three.

WRIGHT v. COURT, BOLTON, and CHAMBERS.

FALSE imprisonment. Plea.—General issue; and several other pleas, which were demurred to.

The defendant, Court, was the constable of Tardebig, in the county of Worcester, and the other defendants were needle manufacturers at that place, who, having been robbed of a considerable quantity of needles, with the assistance of the other defendant, took the plaintiff into custody on the 3d day of November, 1824, and locked him up in the cage at Redditch, and there kept him till the 6th day of November, without taking him before any magistrate. However, on the 6th, they took him before the Rev. Lord Aston, a magistrate, who remanded the plaintiff for two days longer, when he was discharged.

The plaintiff's counsel wished to give in evidence, that several weeks after all the defendants had locked the plaintiff up in the cage, the defendant, Court, said, "I will take care that neither of the Wrights shall have a bed to lie on before the end of six months." At the time this was said the other defendants were not present.

Jervis, for the defendants, objected, that this declaration of the defendant, Court, ought not to be received in evidence, because it was made in the absence of the other defendants. In this action the plaintiff proceeded for an alleged injury committed on him by the three defendants jointly; now, this at most was only a manifesting of individual malice in the defendant, Court, and not at all connected with the other defendants, or having any relation to the joint act done by all of them. He would submit, that there could not be a stronger case to shew the hardship of receiving such evidence than the present. The damages, if any, would be joint against all the defendants; and those damages would be much increased if this expression of individual malice was received in evidence. Now, it was quite clear, that if a verdict passed for the plaintiff, as one of the defendants was only a constable and the others highly respectable manufacturers, the plaintiff would sue out his execution for the whole damages against the latter, although the amount of them was much swelled by this individual declaration of the former.

1825.
WRIGHT
v.
COURT.

GARROW, B.—I am of opinion, that this declaration of the defendant, Court, is evidence. It is necessary, that the plaintiff should connect all the defendants as joint trespassers in the fact of imprisonment; and having done so, I must receive in evidence any thing that either of the defendants said relative to the trespass, though in the absence of the others. So much as to the law. On the hardship of the case, I need only say, that if the law were not so, a man going to do another an injury might proclaim his malice in the market-place, and yet shut out evidence of such malice from the consideration of the jury, by only associating himself in the transaction with other persons a shade less guilty than himself; and persons may always avoid the declarations of the malice of their co-defendants operating against them, by taking care not to be concerned in the doing of things which they cannot afterwards justify.

1825.
 WRIGHT
 v.
 COURT.

The evidence was then received.

Verdict for the plaintiff. — Damages, 5*l*.

Curwood and Carrington, for the plaintiff.

Jervis, Taunton, and Russel, for the defendants.

[Attornies—*Gowland*, and *Robeson*.]

July 19th.

REX v. BILLINGHAM, SAVAGE, and SKINNER.

All persons present countenancing a prize fight, are guilty of an offence.

When a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they refuse to enter into securities, to commit them.

THE prisoners were indicted for a riot, and for assaulting Daniel Rogers, Esquire, a magistrate, in the execution of his office.

It appeared, that Billingham and Savage had agreed to fight a pitched battle; and for that purpose they met at a place near Hagley, and about one thousand persons were assembled to witness the fight. Mr. Rogers was applied to to prevent it, and for that purpose went (with others) to the place, and told them that they should not fight. The defendant Skinner said, that they should, and a scuffle ensued between him and Mr. Rogers, who endeavoured to apprehend him, which ended in a general tumult on the part of the mob, and the rescue of Skinner.

BURROUGH, J.—By law, whatever is done in such an assembly by one, all present are equally liable for; which ought to make persons very careful. It cannot be disputed that all these fights are illegal, and no consent can make them legal, and all the country being present would not make them less an offence. They are unlawful assemblies, and every one going to them is guilty of an offence. The inconvenience in the country is not so great, but nearer London the quantity of crime that these fights lead to, is immense. My advice to magistrates and constables is, in cases where they have information of a fight, to secure the combatants before hand, and take them to a magistrate, who ought to compel them to enter into securities to keep the peace till the next assizes or sessions; and if they will not enter into such security, to

commit them to prison. In this way the mischief would be prevented, and the fights put a stop to.

Verdict.—Guilty.

Russel and Ryan, for the prosecution.

[Attornies—*Hill*, and ———.]

1825.
 Rex
 v.
 BILLINGHAM.

STAFFORD ASSIZES.

REX v. THEODORE MOORE.

July 25th.

THE prisoner was indicted under the stat. 8 & 9 W. 3, c. 26, § 1, for having in his possession an edger, not in common use in any trade, but contrived for marking money round the edges. Other counts charged it to be “an edging tool,” “an instrument,” and an “engine” for the above purpose. The thing found in the prisoner’s possession was a collar, which would make a grained edge, (similar to that now put on half-crowns), on the edges of pieces of metal of that size. This collar was a ring of iron, on the inner edge of which the marks to be indented on the edge of the false coin were made; and it was to be placed on the lower die when in the coining press, and the pressure applied to the blank, by means of the dies, pressed out the blank in a lateral direction, so as to receive the marks on the edge from the inside of this ring of iron.

A collar of iron for graining the edges of counterfeit money, is an instrument within the stat. 8 & 9 W. 3, c. 26, § 1, although it is to be used in a coining press.

It is no objection to evidence on an indictment for felony, that it also goes to shew the prisoner guilty of another felony.

A witness from the mint proved, that this was the present method of putting the grained edges on half-crowns, but that it was a recent invention, and not known at the time of the passing of the act of W. 3. At that time the graining of the edges of coin was a separate process, and distinct from the process of coining, and was done by an instrument held in the hand, and called an edger or edging tool; but that that instrument was not now in use.

Curwood for the prisoner, objected, that it was clearly shewn that this collar was neither an edger nor an edging tool,

1825.
REX
v.
MOORE.

and it was neither an engine nor an instrument, those terms importing things distinct from other machinery. As this collar was of no use except as forming a part of a coining press; it was, therefore, neither an engine nor an instrument, being in fact only a part of something else. The real state of the case was this: in the reign of King William, the only way of graining the edges of money, was by a hand tool; and the legislature, therefore, made it criminal to have such a thing. They could not provide against what was not invented; but it was legal to have a collar of this kind, because no legislative enactment forbade it; the thing not being invented at the time the act passed.

Jervis for the prosecution, argued, that this collar was an instrument for graining the edges of pieces of metal, and was within the general words of the statute, though it might not be an edger or edging tool, and it was not the less an instrument, because it was used in a press, than if used by the hand; and the general words of the act would be of no use, if they did not apply to instruments which were different from the old instrument called an edger.

BURROUGH, J. (having consulted with GARROW, B.) reserved the point for the opinion of the twelve judges.

An accomplice was called, who proved that the prisoner had used this collar for graining the edges of counterfeit half-crowns.

Curwood, for the prisoner, objected to this evidence. The act of coining being a species of treason higher in degree than the one the prisoner was charged with, the greater offence ought not to be given in evidence to prove the less.

BURROUGH, J.—Whatever goes to prove the prisoner

guilty of the offence he is charged with, is evidence; however it may also go to shew him guilty of another felony.

1825.
 REX
 v.
 MOORE.

The evidence was received.

Verdict, guilty.

Jervis, Taunton, and Shepherd, for the prosecution.

Curwood and C. Phillips, for the prisoner.

[Attornies—*Chippendale, and Jones.*]

The first point has been considered by the twelve judges, who were of opinion, that the collar was an instrument within the statute.

MONMOUTH ASSIZES.

JAMES v. SWIFT, Esq.

Aug. 8th.

FALSE imprisonment against the defendant, who was bailiff, and one of the justices of the borough of Monmouth. It appeared, that the plaintiff's attorney was named Thomas Addams Williams.

Ludlow, for the defendant, objected, that the name of the plaintiff's attorney was not correctly stated in the signature to the notice of action: the notice of action being signed, "T. & W. A. Williams." Now, the attorney on the record was, "Thomas Addams Williams," and that was his true name, his brother's name being William Addams Williams, Thomas Addams being the christian name of the attorney in the record.

A notice of action to a magistrate, signed by a firm of two attornies who are partners, and are employed by the plaintiff, is good. And if it be signed T. & W. A. W. this is good, though the christian name of one is T. A., and of the other W. A., if there was no other firm of the same surname, in the place at which the notice bore date.

GARROW, B.—This notice was intended to give your client an opportunity of tendering amends. If you can shew, that in Monmouth (from which this notice is dated) that there are two firms of Williams, who are attornies, there may be something in it; but without that the notice is good.

It is no objection that the notice is signed by a firm.

Ludlow then objected, that the notice was by two attornies, the action being brought only by one.

1825.

JAMES

v.

SWIFT.

GARROW, B. — There is nothing in that.

Verdict for the plaintiff—Damages 5*l*.*Campbell and C. Phillips*, for the plaintiff.*Ludlow*, for the defendant.[Attornies—*T. & W. A. Williams*, and *Philpots*.]

IN the ensuing Michaelmas Term, *Ludlow* moved for a rule nisi for a new trial, but the Court concurred in the opinion of the learned Baron at the trial, and refused the rule.

Aug. 13th.

HOWELL v. YOUNG, Gent, one, &c.

In an action on the case, against an attorney, for negligence, if the declaration state that the plaintiff retained him to see if a certain security were good, and that he accepted the retainer and neglected his duty, and represented the security to be good, and that the plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost the interest.


The gist of the action is the negligence, and therefore the stat. of limitations runs from the time of the negligence, and not from the time of the loss of the interest.

ACTION on the case. The 1st count of the declaration stated, that the plaintiff had agreed with one John Olive and one Ralph Olive to lend them the sum of 3000*l*. the repayment of which was to be secured by a warrant of attorney, to confess, &c. ; and to be further secured by certain mortgages of freehold premises, &c., provided such warrant of attorney and mortgages should be found to be a good and sufficient security ; and that the plaintiff retained the defendant for reasonable fees, &c. to ascertain whether the said warrant of attorney and mortgages would be a good, and valid, and sufficient security for the repayment, &c. ; and that the defendant "having then, and there accepted such retainer and employment, it became, and was his duty to use due and proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a good, valid, and sufficient security to secure," &c. "*nevertheless, the plaintiff in fact saith that the defendant, not regarding his duty in that behalf, but contriving to deceive and defraud the said plaintiff in this respect, did not, nor would use due or proper care and diligence to ascertain whether the said warrant of attorney and mortgages would be a good, valid, &c. security, but wholly neglected and omitted so to do, and, on the contrary thereof, on,*" &c. at, &c. "*falsely and deceitfully*

represented and asserted, and caused and procured the said plaintiff to believe, that the said warrant of attorney and mortgages were a good," &c. "security," &c.: "whereupon, the plaintiff, confiding in the said representations and assertions of the said defendant," advanced the money. The declaration then proceeded to state, that J. & R. Olive gave a warrant of attorney, dated March 1st, 54 Geo. 3, and executed indentures of lease and release on 9th and 10th of March, and an assignment on the 9th of March in the same year; and that these securities were not good or sufficient; by which the plaintiff was injured, and had lost the interest of the sum, and was likely to lose the principal. The 2d count was similar to the first, except that it did not state the warrant of attorney. The 3rd count was similar, but stated it to be an advance of money on a security. The 4th count stated, that the plaintiff had agreed to lend 3000*l.* to J. & R. Olive, on security, and defendant was employed, &c., and falsely asserted, that the warrant of attorney was a sufficient security, well knowing that it was not.

Pleas—1st, The general issue; and, 2d, That the defendant was not guilty of the supposed grievances within six years; and, 3rd, *Actio non accrevit infra sex annos*. Replication, that the cause of action did occur within six years; and a special demurrer to the second plea, on the authority of the case of *Dyster v. Battye*, 3 B. & A. 448.

It appeared, that in the year 1814 the plaintiff had a sum of 3000*l.* and that he went to the defendant, who was an attorney, to place it out for him on freehold security; and the defendant said, he knew two gentlemen near Gloucester who would take it; and that he introduced the plaintiff to the Messrs. Olive, who were then in credit, and considered respectable persons. This money was advanced, and the warrant of attorney and mortgages given, as stated in the declaration. The Olives continued in credit, and kept the interest regularly paid till the month of October, 1820. (R. Olive having died previously,) John Olive became bankrupt in the month of December,

1825.

 HOWELL
 v.
 YOUNG.

1825.
HOWELL
v.
YOUNG.

1820, and died in that month. It was then discovered, that a very considerable proportion of the lands pretended to be mortgaged by Messrs. Olive to the plaintiff did not belong to them, but were the property of other persons; and that the part that did belong to them was not worth 3000*l.* or near that amount. The action was commenced in Michaelmas term, 1824.

BURROUGH, J. asked the plaintiff's counsel, how they got over the statute of limitations?

Curwood, for the plaintiff, referred his Lordship to the cases of *Roberts v. Read*, 16 Ea. 215, and *Gillon v. Bodington*, ante, Vol. 1, p. 541, where it was held, that in an action on the case the statute ran from the time of the damage, which in this case did not accrue till the failure of the payment of the interest, and not from the time of the act done, and no damage had occurred for which the plaintiff could bring an action, till he was injured by the failure of the interest.

BURROUGH, J.—The law is the other way, otherwise, no one would be safe; and his Lordship cited *Short v. M'Carthy*, 3 B. & A. 626.

The plaintiff's counsel then wished to go on the fourth count, which alleged fraud in the defendant, and cited the case of *Bree v. Holbech*, Doug. 130, as an authority to shew that, in cases of fraud, the statute of limitations only ran from the time of the discovery of the fraud.

BURROUGH, J.—Without giving any opinion as to the time from which the statute runs where there is fraud, I shall permit the case to go to the jury. In every other view of the case the statute is a bar.

The case then proceeded on the question of fraud, and

and the jury found a verdict for the defendant, thereby negating the fraud.

Curwood, Maule, C. Phillips, Phillpots, and Carrington, for the plaintiff.

Taunton, Ludlow, Campbell, & Cross, for the defendant.

[Attornies—*Croome & Smith, and Youngs & Duberly.*]

1825.
HOWELL
v.
YOUNG.

IN the ensuing Term, *Curwood* moved for a new trial, on the ground that, in actions on the case the statute runs from the time of the damage, which in this case was the loss of interest in 1820, and not from the time of the act done or omitted, which was the cause of the loss; and the Court granted a rule *nisi*.

COURT OF KING'S BENCH.

BEFORE BAYLEY, HOLROYD, & LITTLEDALE, JS.

In Bank. (Sitting under the King's Warrant.)

THE Court called on *Curwood, Maule, and Carrington*, to support the rule for a new trial. They argued that, to shew from what time the statute ran, it was necessary to consider when the cause of action accrued, which was stated on the present record. It did not follow; that because the plaintiff had a cause of action more than six years ago, he was barred if the cause here stated accrued within six years. In many cases, a plaintiff may have different causes of action, and different forms of action on the same state of facts; notwithstanding the defendant may lose some advantage by the plaintiff changing his form of action. In some instances he may bring his action in case, or in assumpsit, as in that of a carrier for the loss of goods; and yet in the former, the defendant loses his plea in abatement for not joining all his partners. Assignees of a bankrupt may often bring trover instead of assumpsit, which ousts the defendant of a set off; and it is said in *Scott v. Shepherd*, 3

Feb. 14th.

1825.
 HOWELL
 v.
 YOUNG.

Wils. 408; and laid down in *Wheatly v. Stone*, Hob. 180, that a plaintiff might, under some circumstances, bring either trespass or case:—that shewed that he might waive the trespass, and resort to the consequential damage; so a party may bring assumpsit to recover money due instead of debt, although the defendant loses his wager of law. *Slades's case*, 4 Rep. 93 a. And as the plaintiff here had the personal security as well as the bond, he could bring no action till the loss of the interest, because, though the mortgage might be bad from the first, yet the personal security of the Olives might be sufficient. *Hawkins v. Howard & Gibbs*, ante, Vol. 1, p. 222, and a plaintiff cannot sue *quid timet* except in the six cases mentioned by Lord Coke, 1 Inst. 100 a.


BAYLEY, J.—A man certainly cannot sue *quia timet* except in those cases, but if your client had got a bad security, he had a complete cause of action at that time.

The plaintiff's counsel then argued on the cases of *Roberts v. Read*, and *Gillon v. Boddington*, that if the declaration was framed in case, the statute only ran from the damage, although if it had been in assumpsit, the statute would clearly have run from the breach of the promise. As in the cases of *Battley v. Faulkner*, 3 B. & A. 288, and *Short v. M'Carthy*, 3 B. & A. 626. The cause of action being in the one set of cases the damage; in the other, the breach of the promise.

BAYLEY, J.—The cause of action stated in this declaration is, the alleged misconduct of the defendant. The declaration alleges a retainer to do certain work, and that it was the defendant's duty to see that certain securities were good; and then states a breach that the defendant neglected his duty, and misrepresented the goodness of the security, and that the plaintiff lent the money. It also states the security to be bad. This alone is a perfect count, and shews a clear cause of action, and would, on sufficient evi-

dence, have entitled the plaintiff to recover, because the defendant had accepted a retainer, and the plaintiff had got a bad security instead of a good one. The damage is only the natural consequence of the previous injury. If an action is brought for words in themselves actionable, and the declaration states, that "by means whereof," &c. the plaintiff sustained special damage. What is considered as the cause of action? Clearly the speaking of the words, and the latter part is only an explanation of the manner in which the previous injury had occasioned damage. In assumpsit, it is clear that if the breach of duty was beyond the six years, the statute of limitations is a bar, though the damage was within six years. In *Short v. M'Carthy*, an attorney was to make a search, and the statute was there held to run, not from the time of the promise, but from the time of the neglect to perform the duty. I cannot see any substantial difference between assumpsit for a breach of duty, and an action on the case; and it would be a great anomaly, if, where the law raises the duty and the promise, you would be barred in assumpsit; but if you framed your action in case, on the duty, you would not. Framed as this declaration is, the gist of the action is the negligence of the defendant, and not the damage; and therefore, I think, that the statute is a bar.

HOLROYD, J.—I think the negligence is the cause of action, and that the statute is a bar, unless the loss of interest had raised a fresh cause of action; and I think it did not; it merely went to measure the damages. A distinction has been taken between actions on the case for tort, and actions of assumpsit; but the ground of action, the negligence, is the same in both the forms. The case of *Fetter v. Beale*, 1 Salk. 11, goes to shew a distinction between this case and those for excavating near walls. It was a case of assault; the party had recovered damages for the assault, and afterwards a piece of his skull came out, and he brought a fresh action. If the damage had

1825.

 HOWELL
 v.
 YOUNG.

1825.
 HOWELL
 v.
 YOUNG.

been the cause of action, he would have recovered for this fresh injury; but the Court held that he could not. But in the cases of the excavations, there was a continuing cause of action. *Shower*, who was for the plaintiff in the case in *Salkeld*, compared it to a nuisance, where every new dropping is a fresh cause of action; but HOLT, C. J. said, that there was no new battery by the defendant, and that the consequence of the battery was not the cause of action; and in the present case there is not any new negligence. If an action had been brought before the non-payment of the interest, the jury might take into their consideration the probable loss the plaintiff might incur. And if such an action had been brought, the fresh damage by the failure of interest would not have made a fresh cause of action. If so, the plea is proved, and the whole cause of action accrued more than six years ago.

Rule discharged.

LITTLEDALE, J. had left the Court before Mr. Justice HOLROYD had concluded his judgment.

On this point see, in addition to the cases above cited, *Lowe v. Harwood*, Palm. 529; *Saunders v. Edwards*, 1 Sid. 95; and *Whitehead v. Howard*, 2 B. & B. 372.

On the question, how far fraud takes a case out of the statute of

limitations, see the cases of *Bree v. Holbeck*, Doug. 630; *South Sea Company v. Wymondsell*, 3 P. Wms. 143; *Lord Warrington's Case*, 3 P. Wms. 144; *Brown v. Howard*, 2 B. & B. 73; and *Clark v. Hongham*, 3 Dow. & Ry. 322.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

Sittings at Westminster, in Hilary Term, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

DOE on the demise of CHANDLESS v. ROBSON.

1826.
Feb. 1st.

EJECTMENT to recover a house, in the parish of St. Mary-le-bone. The defendant was the under-lessee, and the ejectment was brought by the landlord on an alleged forfeiture incurred by breach of two of the covenants contained in the lease. One of them being a covenant to pay the rent, and the other a covenant to duly keep in repair the pavement of a certain footpath, according to the provisions of a private act of parliament, relative to the pavements of the parish of St. Mary-le-bone.

The lease containing these covenants, and a proviso for re-entry for non-performance of any of the covenants therein contained, was put in, and it was shewn that the defendant was the under-lessee, but no evidence was given on the part of the lessor of the plaintiff to show that any rent had ever been demanded, or that the footpath was not in good repair.

To support an ejectment on a forfeiture of a lease by non-performance of a covenant, if the covenant be to do an act, the lessor of the plaintiff must give some evidence of the omission of the act. And if the covenant be for payment of rent, the lessor of the plaintiff must prove a demand of such rent.

1826.
 {
 DOE
 v.
 ROBSON.

ABBOTT, C. J.—I think the plaintiff must be called, for in all cases of forfeiture, the lessor of the plaintiff must give some negative evidence, that the thing has not been done. If the covenant is to pay rent, it ought to be shewn that the rent has been demanded; and if the covenant be for the doing of any act, some evidence of the omission should be given before a remedy so highly penal can be put in force.

Nonsuit.

Denman and Chitty, for the lessee of the plaintiff.

Storks, for the defendant.

[Attornies C. Wilkinson and Hallet & H.]

Sittings at Westminster after Hilary Term.

Feb. 14th.

DOE on the demise of KNIGHT v. ROWE.

If on the trial of an ejectment against the assignee of a tenant on a forfeiture of a lease by breach of covenant, it appear that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought—The landlord cannot recover, although the covenants be actually broken, and there be neither release nor a dispensation on the part of the landlord.

EJECTMENT to recover a house and premises at Kensington. The lessor of the plaintiff was the landlord, and the defendant had been appointed assignee of a person named John Leonard Jones, who was the lessee, he having taken the benefit of the Insolvent Debtors' act. The lease, which was dated July 20, 1820, contained the usual clause of re-entry for breach of any of the covenants, and *inter alia* the following covenant: "And also, that he, the said John Leonard Jones, his executors, administrators, and assigns, or some or one of them, shall and will, at his and their own costs and charges, forthwith *insure and cause to be insured* upon the said messuages, tenements, and buildings, and upon all such other erections and buildings as shall or may, during the continuance of the said term hereby granted, be erected and built on the premises hereby

demised, or any part thereof, *in two thirds of the value thereof at the least*, from loss or damage by fire, in the Sun Fire Insurance Office for insurance from fire, or in some other respectable office *in the joint names of the said William Knight, his heirs and assigns, and the said John Leonard Jones, his executors, administrators, and assigns*; and from time to time during the continuance of this demise, the said John Leonard, his executors, administrators, and assigns, shall and will renew, and keep in force such policy or policies of insurance, *and also shall and will produce and shew the policy or policies of such insurance, and the receipt of the premium and duty thereof from time to time when thereunto requested by the said William Knight, his heirs, or assigns.*" And it was further provided, that in case of Jones, or his executors, &c. omitting to insure as before covenanted, that the lessor should be at liberty to do so, and to take the premium as increased rent.

1826
 Doe
 v.
 Rown.

On the part of the plaintiff, the execution of the lease was proved, and also, that the defendant was appointed assignee of the lessee under the Insolvent Debtor's Court in March, 1823; and it further appeared, that in the month of October, 1825, Mr. Knight called on the defendant, and asked to see the policy of insurance effected on those premises. It was shewn him, and was for 800*l.*, and in the defendant's name only. And it was proved on the part of the plaintiff, that the premises were worth from 1700*l.* to 1800*l.*; however, on this point there was a contradiction; the defendant's witnesses stated the value not to exceed 1200*l.*

The defence was, that the defendant had believed that he was doing what was right, but that he was deceived by the conduct of the lessor of the plaintiff himself. And it appeared, that when Jones executed the original lease, both that and the counterpart remained with the lessor, he having a lien on them for money lent. But in the year 1822, Jones wishing to raise money upon the lease, Mr.

1826.
DOE
v.
ROWE.

Knight, the lessor of the plaintiff, being an attorney, prepared an abstract, which was then shewn to the defendant. In that abstract it was stated, that the tenant was "to insure and keep insured the premises, and to produce the policy and receipts; and if no insurance, or a refusal to produce the policy and receipts, Mr. Knight is to be at liberty to insure." At Christmas, 1823, a year's rent was due, and Jones having been discharged under the Insolvent Debtors' act, it appeared, that from Christmas, 1823, to Christmas, 1824, the lessor of the plaintiff had himself insured the premises at the Phoenix Fire Office at 800*l.*, and that at Christmas, 1824, the defendant insured them at that office at the same sum.

On these facts, *Campbell*, for the defendant, argued that the defendant had acted *bonâ fide*; that he was led to do what he had done by having seen an abstract furnished by the lessor of the plaintiff himself; and that as to the sum insured, that was the precise value at which the lessor of the plaintiff had himself insured the premises in the previous year.

Scarlett, contra, contended, that these facts were neither a release nor a dispensation with the covenant, and that as to the abstract, any one who was going to purchase the premises, or to lend money on them, would not do so without a perusal of the original lease.

ABBOTT, C. J.—The lessee and his assigns are, by this covenant, bound to effect an insurance on the premises at two-thirds of their value; and though there is clearly no dispensation in this case, I am of opinion, that if the conduct of the lessor of the plaintiff was such as to induce any cautious and reasonable man to suppose that he would be doing enough if he insured at 800*l.* in his own name, as this is a case of forfeiture, the lessor of the plaintiff would not be entitled to recover: and, in that way, I

shall leave the case to the jury. Mr. Rowe insured at the same sum at which the lessor of the plaintiff himself had insured, and he effected the policy at the same insurance-office. It is said that the policy was in his own name only. Now, on that point it will be for the jury to say, whether, after seeing the abstract, the defendant did not, as a reasonably prudent man, think that he was doing all that was necessary; for if he did, although the abstract was not intended to deceive, the defendant is entitled to a verdict, this ejectment being brought for a forfeiture.

1826.

Doe
v.
Rowe.

Verdict for the defendant.

Scarlett and *Holt*, for the lessor of the plaintiff.

Campbell, for the defendant.

[Attornies—*Popkin* and *Thomas*.]

By the cases of *Reynolds v. Pitt*, 19 Ves. 134, and *White v. Warner*, 2 Mer. 459, it appears that equity will not grant an injunction

against an ejectment for a breach of covenant to insure against fire. See also the case of *Doe d. Pott v. Sherwin*, 3 Camp. 134.

JARMAIN v. ALGAR.

Feb. 14th.

THE declaration stated, that at the time of, &c. one George Flack was indebted to the plaintiff in the sum of 3*l.* 4*s.* 8*d.*, and that the plaintiff had caused a certain bailable writ called a latitat, indorsed for bail for that sum, to be issued out of the Court, &c. and was about to cause Flack to be arrested thereon; and that the defendant, in consideration that the plaintiff would forbear to arrest Flack, promised to execute a bail-bond upon process issued either into Sussex or Middlesex against Flack, when such bond should be tendered to him, within one week from the time

A promise by a party to execute a bail-bond on a writ to be sued out against A. B. in consideration of the plaintiff forbearing to arrest A. B. on a writ already sued out, is not a promise to answer for the debt, &c. of another, under the 4th section of the statute of frauds.

An averment of a tender of the bail-bond for execution is not proved by evidence of the sheriff's officer going to the defendant, and asking him to sign the bail-bond, no bond being produced, he having none with him, and his assistant only having some blank bonds in his pocket, which he always carried.

1826.
 JARMAN
 v.
 ALGAR.

of making the promise. It then averred that the plaintiff did forbear to arrest Flack, and caused a bill of Middlesex to be issued against him, and that the sheriff of Middlesex, within the time limited, *tendered a bail-bond, conditioned, &c. and requested the defendant to execute it*; yet that defendant not regarding, &c. refused to execute, whereby, &c. Plea—General issue.

It appeared, that very early in the month of August, 1825, a bailable writ was sued out against Mr. George Flack, and that Mr. Roe, the plaintiff's attorney, soon after went to Brighton, where he saw Mr. Flack and the defendant, when the latter, in consideration that Mr. Roe would not cause Flack to be arrested on that writ, entered into the following undertaking:

" JARMAN against FLACK.

" Mr. James Roe,

" I hereby undertake to sign a bail-bond for the above
 " defendant in this action, either on a writ issued into Sus-
 " sex or into Middlesex, when tendered to me within one
 " week from this date.

" August 8, 1825. (Signed) " Jos. ALGAR."

On the 13th of August Mr. Roe sued out a bill of Middlesex against Mr. Flack, the original defendant, indorsed for bail, to the amount of 3*l.* 4*s.* 8*d.*; and a warrant was delivered to Whitcombe, a sheriff's officer, who, on the same day, (Aug. 13th), went to the defendant, and told him that he came by the desire of Mr. Roe to ask him to sign the bail-bond for Mr. Flack, and that the defendant declined to execute the bond till Mr. Flack's name was to it. It however appeared, that no bond was produced by the officer, nor had he any bail-bond in his possession at the time; but his assistant, who accompanied him, proved that he had some blank bail-bonds in his pocket, which he always carried.

Marryat and *Stephen* for the defendant.—In this case the plaintiff must be called. This undertaking is a promise to answer for the default of *Flack*, and is a promise within the fourth section of the statute of frauds (a). It may be argued that this is not an undertaking to pay the money; but it being a promise to execute a bail-bond, the party impliedly undertakes to pay the debt, in one of the events which the bail-bond is to meet. If this be within the statute, though it is in writing, it will not be good, as it does not state the consideration, which is essential to a guarantee under the case of *Saunders v. Wakefield*, 4 B. & A. 595. There is also another ground of nonsuit, which is, that the plaintiff in his declaration alleges an actual tender of the bond for execution. Now, nothing like a tender of it is proved. Perhaps it may be answered, that the circumstances that occurred between *Whitcombe* and the defendant amounted to a dispensing with the tender. But if that were so, it should have been stated in that way. In cases of real property there are two modes of declaring; either to aver a tender of the conveyance, or a dispensation.—Here the plaintiff has alleged an actual tender, and failed in proving it.

ABBOTT, C. J.—As at present advised I think this undertaking is not within the statute of frauds, and is not a promise to answer for the debt, default, or miscarriage of another, within the meaning of its provisions.

Gurney, for the plaintiff.—On the point made as to the

(a) By the 4th section of the stat. of frauds, 29 Car. 2, c. 3, it is enacted, 'that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement up-

' on which such action is brought,
' or some memorandum or note
' thereof, shall be in writing, and
' signed by the party to be charged
' therewith, or some other person
' thereunto by him lawfully au-
' thorised.'

1826.
JARMAN
v.
ALGAR.

1826.
 JARMAIN
 v.
 ALGAR.

tender, I submit, that where it has appeared that a party has had his money ready, but he was told by the other party that it would not be received, that is a good tender, although the money was not produced; therefore in this case, if the facts amount to this, that the defendant by his conduct prevented the officer from tendering the bond, the plaintiff ought not to be prejudiced by it.

ABBOTT, C. J.—To prevent the necessity of the record coming down again, Mr. *Marryat* had better address the Jury as to the damages.

Marryat addressed the Jury, who found for the plaintiff.

Damages 34*l.* 4*s.*

ABBOTT, C. J.—I am of opinion that the plaintiff has failed in proving the tender of the bond, and that therefore he must be nonsuited.

The plaintiff was then nonsuited, Mr. *Gurney* having leave to move to enter a verdict for the plaintiff for the sum of 34*l.* 4*s.* (*b*).

Gurney and *Talfourd* for the plaintiff.

Marryat and *Stephen* for the defendant.

[Attornies—*Roe* and *Collins*.]

(*b*) No motion was ever made.

Feb. 18*th*.

GOLDSTEIN v. Foss and Another.

A circular by the secretary of a society for the protection of trade against swindlers and sharpers, stating, that the plaintiff is considered an improper person to be proposed to be ballotted for as a member of that society, meaning thereby, that the plaintiff is a sharper and swindler, is a libel; and if the Jury are satisfied that that imputation is made, it is a libel, however cautiously the paper may be worded.

LIBEL. The first count of the declaration stated, that the plaintiff was always reputed, and, &c. to be of good

name and credit, and that he now, and for divers years had exercised and carried on, and still carries on the trade and business of a merchant, in co-partnership with Alexander Cohan Castle (a), and behaved himself honestly, &c. in his trade and business, and was never guilty of acting in any wise dishonestly, and was acquiring great gains and profits; and that certain persons had been associated together under the name and description of "The Society for the protection of Trade against swindlers and sharpers;" and that the said defendant E. J. Foss, "under colour and pretence of being secretary of the said society, had from time to time published and was accustomed to publish certain printed reports, for the purpose of denoting and signifying to the members of the said society the names of such persons as were deemed and considered swindlers and sharpers, and improper persons to be proposed to be ballotted for as members of the said society, to wit, at, &c. yet the said defendant well knowing the premises, and greatly envying, &c. and contriving, &c. and thereby to injure the said plaintiff in his trade and business aforesaid, on, &c. at, &c. falsely and maliciously did compose, print, and publish, &c. of and concerning the plaintiff, the false, &c. libel containing, among other things, the false, scandalous, defamatory, and libellous matter following, of and concerning the said plaintiff in the way of his said trade and business, that is to say, 10 Correspondence, 1825, Society of Guardians for the Protection of Trade against Swindlers

1826.
 GOLDSTEIN
 v.
 FOSS.

(a) In cases of defamation, two persons cannot in general join in one action, for words spoken of both of them. In the case of *Smith v. Booker*, Cro. Car. 512, it is laid down, that if one say to two, you jointly murdered J. S., each must bring a separate action; but in the case of *Bods v. Batchelor*, 3 Bos. & Pul. 150, it was held, that if words be spoken of parties

in respect of their trade, and there be special damage to them in their trade, they may maintain a joint action, though the words were actionable on themselves. And Mr. Serjeant Williams gives it as his opinion (1 Wms. Saund. 117, a.) that two or more partners may join in an action for words, although they have sustained no special damage.

1826.
 GOLDSTEIN
 v.
 FOSS.

and Sharpers, Richard Clark, Esq. Chamberlain of London, President; George Bridges, Esq. Alderman, and M.P. Vice President; Messrs. William Praed & Co. Bankers, Treasurers. I, (meaning the said defendant E. J. F.) am directed to inform you, that the persons under-named, or using the firms of Goldstein, (meaning the said plaintiff), Castles, & Co. 51 Mark Lane, and Benjamin Porter, Baker, Hackney Road, are reported to this society as improper to be proposed to be ballotted for as members thereof, (thereby then and there meaning that the said plaintiff was a swindler and sharper, and an improper person to be a member of the said society)."

The second count stated the libel to be of and concerning the plaintiff in his business as a merchant; and the concluding innuendo was, "(meaning thereby that the said plaintiff was an improper person to become a member of the said society, and was not a person fit to be intrusted in the way of his trade and business as a merchant)."

The third count was similar, except that the concluding innuendo was "(thereby then and there meaning that the said plaintiff was an improper person to be a member of the said society, and had been and was guilty of dishonest and dishonourable conduct)."

The fourth count did not state the libel to be of the plaintiff in his business; and the concluding innuendo was "(thereby then and there meaning that the said plaintiff was not a person of honest and upright conduct)." Plea—General issue.

The libel was by putting the plaintiff's name and address in what is commonly called the swindling list. Mr. Foss, one of the defendants, was the secretary of a society called The Society for the Protection of Trade, and he sent the printed circular, stated in the declaration, to the members of that society, which was the libel complained of. The other defendant was the printer.

Mr. Praed, a banker in London, and another witness, proved that they understood the plaintiff to be the person meant, and that they understood the letter to import that

he was a man not fit to be trusted, and connected with swindlers.

1826.
GOLDSTEIN
v.
FOSS.

The defendant's counsel contended, that the terms of the libel not imputing any offence, were not actionable without special damage.

ABBOTT, C. J.—On this evidence, can any human being doubt what was meant to be imputed to the plaintiff; and no proof of special damage is necessary after such an imputation, however cautiously worded.

Verdict for the plaintiff.—Damages, 150*l*.

Scarlett, F. Pollock, Brougham, and Chitty, for the plaintiff.

Gurney, Campbell, and Comyn, for the defendants.

[Attornies *E. Isaacs* and *Foss*.]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITTLEDALE, JS.
In Bank.

Campbell now moved in arrest of judgment, on the ground, that as the action was for publishing alleged libellous matter, which did not, on the face of it, import the meaning applied to it to make it actionable, the declaration was bad; because it did not contain any colloquium, nor any introductory averment that the alleged libel was written of and concerning the extrinsic matter, which made it of libellous import; and that the innuendo could not supply the omission: and he cited *Holt v. Scholefield*, 6 T. R. 691, and *Hawkes v. Hawkes*, 8 East, 427 (a). April, 13th.

The Court granted a rule to shew cause.

(a) The case of *Holt v. Scholefield*, was an action for slander. The declaration stated, that the plaintiff was of good fame, and

1826.
 GOLDSTEIN
 v.
 FOSS.

never suspected of perjury; and that the defendant maliciously intending to injure him, and subject him to the punishment provided for the crime of perjury, spoke, &c. "of and concerning the plaintiff;" Tim Holt, (meaning the plaintiff), has *forsworn* himself, (meaning that the plaintiff had committed wilful and corrupt perjury). It was objected, in arrest of judgment, that the word *forsworn* did not necessarily imply a false swearing in a judicial proceeding, and that the meaning could not be varied by the innuendo, unless with reference to some colloquium, (which was not here), from which it might appear that the words were spoken concerning some judicial proceeding in which the plaintiff had given testimony. Lord Kenyon said, that "either the words themselves must be such as can only be understood in a criminal sense, or it must be shewn by a colloquium in the introductory part, that they have that meaning:" and the judgment was arrested. In that case, the previous authorities on this subject will be found collected.

In the case of *Hawkes v. Hawkes*, which was also a case of verbal slander, the declaration stated, that the plaintiff had duly put in his answer on oath to a bill in the Exchequer, and that the defendant said of and concerning the plaintiff, that he was *forsworn*,

(meaning that the plaintiff had perjured himself in his said answer to the bill so filed against him as aforesaid). It was here objected, that there was no colloquium or introductory averment that the words were spoken of the plaintiff with reference to any judicial proceeding. This was held to be bad, and Lord Ellenborough said, "that the clear rule was, that, not only where the words spoken do not in themselves naturally convey the meaning imputed by the innuendo, but also, where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also, that the words were spoken of and concerning that matter. As, Lord C. J. De Grey says in the case of *The King v. Horne*, (2 Cowp. 684), speaking of *Barham's* case (4 Rep. 20 a. where the slander was, 'he has burnt my barn,' the plaintiff cannot say by way of innuendo 'my barn full of corn,' because that is not an explanation of the words, but an addition to them. But, if in the introduction it had been averred, that the defendant *had a barn full of corn, and that in a discourse about that barn* the defendant had spoken the words, an innuendo that he meant by these words the barn full of corn, would have been good."

1826.

COURT OF COMMON PLEAS.

Sittings in London, after Hilary Term, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

WILLIAMS, Gent. One, &c. v. GOODWIN the Elder.

Feb. 15th.

ASSUMPSIT for an attorney's bill.—The charges were for bringing an action against a person named Stansfeld, of the Alderney Dairy Company, on behalf of Goodwin the younger, for a malicious prosecution; and the question of fact in the cause was, Whether the employment of the plaintiff to conduct that action was by the younger Goodwin or his father, the defendant.

From the evidence of the plaintiff's managing clerk, it appeared that the present defendant, Goodwin, senior, had given the instructions for the former suit, and, after plea pleaded, was told by the witness that 20*l.* would be wanted towards the expences of the cause. He came afterwards with the money, and brought his son with him. On the money being paid, the attorney's clerk was about to give a receipt in the name of Goodwin, senior, when he said, "It will make no difference if you give it in my son's name, for if the cause is lost, we shall get the cow-keepers to subscribe, if they think it is my son's action, but they will not subscribe if they think I have any thing to do with it." The receipt was accordingly given in the son's name. The son was at the time in insolvent circumstances. On the cross-examination of this witness, he admitted that Goodwin, senior, had been called and examined in his son's cause (no question being asked as to his interest), without having been released; but it appeared that a release was in Court, ready to be filled up if any objection had been taken.

If an attorney, having given credit to a person for the costs of a suit, put forward such person as a witness, and have him examined on the trial of the cause, without a release, (no objection being taken), he cannot afterwards maintain an action against him for the recovery of such costs. If an attorney's clerk give a receipt for money on account to a different person from that to whom he gives credit, to enable such person to deceive others, such act of the clerk will not affect the master's right to recover the remainder against such person, though, if the attorney had done it himself, it would be good ground of non-suit.

Spankie, Serjt. for the defendant.—There has been

1826.
WILLIAMS
v.
GOODWIN.

a great deal of irregularity in the conduct of this plaintiff. His calling old Goodwin as a witness was a fraud upon the Judge and Jury. Will public policy permit an attorney to act in such a manner? Will it allow him to recover from a person whom he presents in Court as an impartial and disinterested witness? He has put forward the person in the character of a party not liable to him, and he is bound and concluded by that act.

BEST, C. J. observed.—If the attorney himself had given the receipt mentioned, I should have nonsuited him upon it immediately; but I doubt whether he is answerable for the act done by his clerk. My opinion, however, upon the whole of the facts is, that an attorney, under such circumstances as are disclosed in this case, is not in a situation to maintain an action. I will put it to the jury to say, whether, in point of fact, the credit was given to the elder Goodwin; but if they find that it was, I will notwithstanding nonsuit the plaintiff, and give him leave to move to enter a verdict.

The Jury found that the credit was given to the elder Goodwin alone.

Nonsuit, with leave to move.

Vaughan, Serjt. and *Andrews*, for the plaintiff.

Spankie, Serjt. and *Thesiger*, for the defendant.

[Attornies—*T. N. Williams*, and *Dollman*.]

On the 3d day of the ensuing Term, *Vaughan*, Serjt. moved to set aside the nonsuit, pursuant to the leave given. If the attorney has misconducted himself, he is liable to be punished. The putting an incompetent witness into the box is of every day's occurrence, and it is for the opposite counsel to take an objection to his testimony. The question here is upon a contract.

PARK, J.—I think it would be holding out a dangerous precedent to grant a rule to shew cause in this case. The sources of justice should be kept pure. I think my Lord Chief Justice was right in directing a nonsuit at the trial. I think the impression upon which he acted, was an honourable honest, and legal impression. And what do we do, by refusing a rule, but put this plaintiff in the same situation as he would have been in if he had released the defendant—which he must have done if the objection had been taken? For these reasons, I am of opinion, that a rule ought not to be granted.

1826.
WILLIAMS
v.
GOODWIN.

The rest of the Court agreed.

Rule refused.

Sittings at Westminster, after Hilary Term, 1826.

GILES, Assignee of HILLS, a Bankrupt, v. POWELL.

Feb. 16th.

ASSUMPSIT for work and labour done by the bankrupt before his bankruptcy.

The commission was put in. It was dated on the 21st of May, 1825: there was no notice of disputing the petitioning creditor's debt, &c.

After the plaintiff has closed his case, the learned Judge will in general allow him to adduce fresh evidence to obviate objections which are beside the justice of the case, but not to get rid of any difficulty on the merits.

BEST, C. J. (after referring to the stat. 6 Geo. 4, c. 16.)
—The statute 5 Geo. 4, c. 98, is instantly repealed on the passing of this act, which received the royal assent on the 2d of May, 1825, except as to what relates to certifi-

In actions by the assignees of bankrupts, if the commission issued between

the 2d of May and the 1st of September, 1825, the formal proofs in support of the commission must be made out by parol evidence of the trading, act of bankruptcy, &c. whether notice of disputing them has been given or not.

Semble.—That evidence of the mere facts of a bankrupt having drawn or indorsed a bill for 100l., and of that bill being over-due in the hands of a holder, is not sufficient proof of a petitioning creditor's debt, without proof of a default in the acceptor.

1826.
GILES
v.
POWELL.

cates. Now, the new act is not to take effect till the 1st of September, 1825. This commission is between those two dates; and the repeal of the stat. 5 Geo. 4 being immediate, and the provisions of the stat. 6 Geo. 4 not taking effect till a later period, you cannot avail yourself of the modes of proving the petitioning creditor's debt, &c. which are pointed out by either of those statutes.

The plaintiff's counsel proceeded to give parol evidence of the trading and act of bankruptcy.

The petitioning creditor's debt was on two bills of exchange, to the amount of 124*l*., of which the petitioning creditor was the holder, the bankrupt being the indorser of both, and the drawer of one of them. The hand-writing of the bankrupt to both was proved. One of the bills was dated February 4th, 1825, and was for 74*l*., payable three months after date: the other was dated December 24th, 1824, for 50*l*., at two months. The work done, for which the action was brought, was not disputed.

The plaintiff's counsel having closed their case,

Vaughan, Serjt. objected, that as the bankrupt was the drawer of one of these bills, and the indorser of the other, the proof of his hand-writing, and the fact of their being over-due, would not shew a good petitioning creditor's debt without proof that the acceptor had made default.

BEST, C. J.—If the acceptor makes default, the drawer becomes liable; but unless I am shewn some authority to warrant it, I shall not hold that the drawer or indorser is liable without a default of the acceptor being proved.

The plaintiff's counsel wished to call a witness to prove that the bills had been dishonoured, and that due notice of dishonour had been given to the bankrupt.

Vaughan, Serjt.—I hope your Lordship will not allow them to add this fresh evidence, after they have closed their case.

1826.
GILES
v.
POWELL.

BEST, C. J.—I shall always allow a party to adduce fresh evidence on points of this kind. I had a conversation with my Lord Chief Justice *Abbott* on the subject; and his Lordship stated, that he would never allow a witness to be called back to get rid of any difficulty on the merits, or on any thing which went to the justice of the case; but that he always allowed it to be done to get rid of objections which were beside the justice of the case, and little more than matter of form. I shall, therefore, allow the witness to be examined (a).

The witness proved the dishonour of the bills, and the notice to the bankrupt.

Verdict for the plaintiff.

Taddy, Serjt. and *Storkes*, for the plaintiff.

Vaughan, Serjt. for the defendant.

[Attornies—*Hallet & H.*, and *Carlton*.]

(a) See *post*, pp. 269, 270.

Adjourned Sittings in London, after Hilary Term, 1826.

BECKWITH v. CORRALL and Others.

Feb. 21st.

TROVER for a bill of exchange for 33*l.* 2*s.*, drawn by Hammond and Co., bankers at Canterbury, on, and ac-

If a party possess himself of a stolen bill or note improperly, a demand and

a refusal are not necessary previous to an action of trover brought for its recovery by the loser.

If a party be robbed of a negotiable security eight days before it is payable, and he does not give notice of his loss till the end of seven days, and then only to the payer, but gives no notice of any kind to the public, he does not use due diligence, and cannot recover in trover against a party who discounted such security six days after the loss.

And in such a case, the questions proper for the jury are, first, whether the plaintiff has used due diligence; and then, whether the defendant has acted with due caution,—unless there should be reason to suspect that the defendant knew, when he discounted the security, that it had been obtained by means of a felony: in which case, the conduct of the plaintiff may be left out of the question.

1826.
 BECKWITH
 v.
 CORBALL.

cepted by Remington and Co. bankers in London, payable to the order of H. Meredith, and indorsed by him.

On the 23^d of December, 1825, the plaintiff was at an election at St. Dunstan's Church. He left between seven and eight in the evening, having his pocket-book with the bill in question in it, and retired to the Sussex Hotel, where, on feeling for his pocket-book to answer a question put to him, he found that his pocket had been cut, and the book taken away. A letter was the next day written to Mr. Meredith, at Liverpool, for the particulars of the bill, and his answer was received on *the 26th*. On *the 27th*, the following advertisement was inserted by the plaintiff in the Morning Advertiser :

“ Lost, on Tuesday last, near St. Dunstan's Church,
 “ Fleet Street, a pocket-book [describing it]. Whoever will
 “ bring it to [mentioning some public-house in Holborn],
 “ shall receive two guineas reward. No further reward
 “ will be offered, as the contents are not worth a shilling
 “ to any one but the owner.”

On Friday the 30th, notice of what had happened was given to Remington and Co., the acceptors. The bill became due on Saturday the 31st; and about six o'clock on the evening of that day, it was ascertained that it had been paid. On Sunday the 1st of January, 1826, the plaintiff's son went down to the banking-house of the defendants at Maidstone, and saw their principal clerk, who stated that he had taken the note in question on Thursday *the 29th* of December, of two young men, one of whom represented to him that the indorsement by Meredith was in the handwriting of his father: that he (the clerk) knew there was no such person as Meredith residing at Maidstone: that he supposed the young men to be persons passing through, and that he could not swear to them if he were to see them. It appeared that the pocket-book, without the bill, was thrown down the area of the plaintiff's house on Monday

the 2d of January, accompanied by a letter written in the name of "Catchall."

It was admitted that the defendants had given value for the bill.

1826.
BROOKWITH
v.
CORRALL.

Taddy, Serjt. for the defendants, upon this state of facts contended that there was no conversion to maintain the action of trover. There should have been a demand made of the bill.

BEST, C. J.—There is no necessity for a demand, if the party possessing himself of the bill did so improperly.

Taddy, Serjt.—The plaintiff should have sent immediately to Remington's, instead of which he suffers seven days to elapse without giving any notice. We did not keep the bill. If any of the parties had failed, we should have been liable to the plaintiff; we acted in the proper course.

BEST, C. J.—If you have not used due caution, you ought not to have touched the bill; the very touching it is a conversion.

Taddy, Serjt., then went to the Jury.—He contended, that the plaintiff was not entitled to recover, as he had not conducted himself with all proper diligence. The advertisement is no notice to the public of the loss of any bill. Notice also should have been given to the drawers. The defendants, being country bankers at Maidstone, must have been acquainted with the hand-writing of the drawers, who were bankers at Canterbury, in the same county. Is not a banker justified in discounting a bill drawn by a neighbouring banker? Is he, without any advertisement, or any circumstances of suspicion appearing, to ask questions, and suspect that the party presenting it has obtained it through a felony? The plaintiff might have prevented

1846.
 BECKWITH
 v.
 CORRALE.

the mischief which happened, if he had given timely notice, either generally, or at Remington and Co.'s. Remington and Co. would have given notice to the drawers, and the drawers would have given notice to the discounters. Though the case of *Lawson v. Weston* (a) has been overruled, yet the general principles of that case are good, and apply themselves to this. The late case of *Snow v. Peacock* (b) went mainly on the magnitude of the note, it being for 500*l.*; but in this case the amount is only 33*l.*

BEST, C. J.—The circumstances of this case are very different from those of *Snow v. Peacock*. The question is, has the plaintiff done all that he ought to do in order to apprise the public of the loss of the bill? If he has not, I am of opinion, that he cannot recover. The bill was lost on the 23d of December. Ought not the plaintiff to have given notice immediately? In the case of *Snow v. Peacock*, hand-bills were circulated, and advertisements inserted in “The Hue and Cry.” But in this case nothing of the kind was done. No notice at all was given till the day before the bill became payable, and then only to the payers. There was no notice at all to the public. His Lordship left the case to the Jury, who found a

Verdict for the defendants.

Wilde, Serjt. and *S. M. Phillipps*, for the plaintiff.

Taddy, Serjt. and *Comyn*, for the defendants.

[Attornies—*Henson & D.*, and *Egan & Waterman*.]

(a) 4 Esp. N. P. C. 56.

(b) *Ante*, p. 215.

ON the 1st day of the following Term, *Wilde*, Serjt. moved for a new trial, on the ground, that it should not have been left to the Jury to say, 1st, Whether the plain-

tiff had acted with due caution, and if he had, *then*, whether the defendants had done so; but that it should have been left to them to say, *at all events*, whether or no the defendants were *bond fide* holders.

1826.
BECKWITH
v.
CORRALL.

PARK and BURROUGH, Js., thought that the question had been rightly left to the Jury.

GASELEE, J.—There may be a case in which, notwithstanding the plaintiff has not done his duty, yet the defendants may have so conducted themselves as to make themselves liable; but, in this case, I do not find such circumstances.

BEST, C. J.—I quite agree with my Brother GASELEE; and if there had been the slightest reason to think that the defendants in this case had any knowledge of the bills having been stolen, or if I had been asked by either party to put that question to the Jury, I should have given the go by to the other question of—whether or no the plaintiff had used due diligence? But there is no pretence for any such idea. And I think, that in those cases where a negotiable security is lost, it is the duty of the loser to give notice to the public, or else a person may very innocently receive it, and give value fairly for it.

Rule refused.

1826.

COURT OF KING'S BENCH.

Sittings at Westminster, after Easter Term, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

May 9th.

FAIRMAN v. GRIMBLE.

The servant of the defendant, a coach springmaker, received a spring of the plaintiff's to repair, and promised to bring it back by a certain hour. The defendant, after that, refused to return it without being first paid for the repair:—Held, not a sufficient conversion to support trover. The action, if any will lie, should be special assumpsit.

TROVER for a carriage spring. Plea—General issue.

The defendant was a coach spring maker, and it was proved that his servant took a broken spring off a single horse break of the plaintiff, and said he would mend and replace it by 12 o'clock on the same day. He did not bring it back; and on the defendant being applied to for the spring, he said he would not put it on till he was paid for the repair. The plaintiff said he would pay him as soon as he had replaced the spring; but the defendant insisted on being paid first.

ABBOTT, C. J.—This is nothing like a conversion by the defendant to his own use. If an action will lie at all, it must be for the breach of a special contract.

Nonsuit.

Abraham, for the plaintiff.*Scarlett*, for the defendant.[Attornies *Clarke*, and *Gresham*.]

1826.

Adjourned Sittings in London, after Easter Term, 1826.

COOPER v. AMOS.

May 25th.

ASSUMPSIT. The first count of the declaration was on a bill of exchange for 40*l.*, of which the defendant was the indorser. The second count was on a bill of exchange for 20*l.* of which the defendant was also the indorser. There was also a count for goods sold, and the other money counts. Plea—General issue.

The plaintiff made out a case on the two bills, and also for goods sold.

R. S. Richards, for the defendant, stated that the plaintiff's attorney had delivered a particular of his demand under a Judge's order, in which the demand for the goods and the bill stated in the second count were specified; but that in the particular, the bill for 40*l.* was not mentioned; he therefore contended, that as that bill was not mentioned in the particular of demand, the plaintiff could not recover on it.

If the declaration is on a bill of exchange, and for goods sold, and a particular of demand is obtained under a Judge's order, the plaintiff may recover on the bill, though it is not mentioned in his particular of demand.

ABBOTT, C. J.—That is no objection; if the bill is stated in the declaration, it need not be mentioned in the particular. You must give a particular of goods sold, but you never need give a particular of bills of exchange, if they appear in the declaration.

Verdict for the plaintiff.—Damages 142*l.*

Campbell, for the plaintiff.

R. S. Richards, for the defendant.

[Attornies *Osbaldeston & M.*, and *H. Hughes*.]

For the other authorities on the subject of particulars of de- mand, see Arch. Pract. K. B. 221.

1826.

COURT OF COMMON PLEAS.

Sittings at Westminster, in Easter Term, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

April 19th.

WALLS v. ATCHESON.

If a person let apartments for a year to a tenant, who occupies them part of the year, for which he pays, and then quits; and the party letting suffer another to occupy on an agreement also for a year, so that the first tenant could not, if he had wished, have obtained possession, such second letting is a rescinding of the first contract, so as to prevent any rent being recovered under it.

USE and occupation. The defendant took lodgings in the plaintiff's house, from 14th September, 1824, for a twelvemonth certain, at 65 guineas a-year; he occupied during the whole of the first and part of the second quarter. The rent for the first quarter had been paid, and it was to recover rent for the remainder of the twelvemonth, that the action was brought. It appeared that, about three weeks after the defendant ceased to occupy, the plaintiff let the lodgings to a General Harley, who occupied for three months, went on the Continent for three months, and then came again into occupation, and had continued to occupy up to the time of the trial.

Cross, Serjt., for the defendant, contended that the plaintiff had no right to recover. It is absurd to say, according to the terms of the declaration, that the defendant "*occupied by the permission of the plaintiff*," when in fact another person was occupying by her permission on another contract.

Vaughan, Serjt.—I submit that this case comes clearly within the principle laid down by Lord *Kenyon* in *Redpath v. Roberts* (a). If the plaintiff has used the premises improperly, then let the defendant bring an action

(a) 3 Esp. 225.

against her. There is nothing that manifests an intention on the part of the plaintiff to release the defendant.

1826.

WALLS

s.

ATCHERSON.

Chitty, on the same side.—This case is analogous to the second sale of goods, which the first purchaser refuses to accept. There, the difference is allowance to be recovered; and so it ought to be here: it is to prevent a total loss.

BEST, C. J.—The question is, whether the act of the plaintiff is not a rescinding of the contract. I am of opinion that it is. I can see no fact to leave to the Jury. There is no doubt that the letting was for a twelvemonth, and if nothing had taken place, the defendant must have paid for the whole time. Mr. *Chitty* has compared this case to the case of a sale of goods which a party has refused to accept; but there, it is usual to give a notice, requiring that the goods may be taken away; and then if they are not taken away, that is a circumstance from which a Jury may presume an assent to a second sale on the part of the person to whom the notice was given. But in this case, there is no notice to the defendant. If the plaintiff put in General Harley, and could not turn him out, the defendant could not have the benefit of his contract, and therefore is not liable to pay.

Vaughan, Serjt. then proposed to read a notice which he had intended to have given in evidence, but which, from some circumstance or other, had been overlooked.

Cross, Serjt. objected to the plaintiff's mending his case after an argument.

BEST, C. J.—I would not allow the addition of any parol evidence by a witness. I have communicated with the Chief Justice of the K. B. upon this subject; and we have agreed that it is better not to lay down any particular rule, but to leave it to the discretion of the Judge who tries a

1826.
 WALLS
 v.
 ATCHESON.

cause, under the particular circumstances, to admit or not admit what may be material (a). In this case, I think I ought to admit this paper, because it cannot have been got up and manufactured for the purposes of the cause since the commencement of the trial.

The notice was then read. It only applied to the period of time subsequent to the three months during which General Harley had occupied under the second contract.

BEST, C. J. was of opinion, that the reading of such a notice, did not put the plaintiff in a better situation than he was in before; and adhering to his previous opinion, directed him to be

Nonsuited.

Vaughan, Serjt., and *Chitty*, for the plaintiff.

Cross, Serjt., for the defendant.

[Attornies *R. Hill* and *Lever*.]

(a) See *ante*, 261.

IN the course of the Term, *Vaughan*, Serjt. moved for a new trial. He again cited the case of *Redpath v. Roberts*.

BEST, C. J.—There is a distinction between that case and the present; for in that case, there was only an endeavour to let, which was not successful; and till any other person got actually into possession, the original tenant might have resumed his occupation, and received the benefit of his contract.

Vaughan, Serjt., then cited the case of *Mollett v. Brayne* (b).

(b) 2 Camp. 103.

PARK, J.—I think the Chief Justice was right in non-suiting the plaintiff, and that there is no colour for this application. I should like to have the case of *Mollett v. Brayne* reconsidered.

1826.
WALLS.
*
ATCHESON.

BURROUGH, J.—If there was a continued holding by the defendant, to let any other into possession was a tortious act, which, in my opinion, amounts to an eviction, and must be considered as determining the tenancy.

GASELEE, J.—I think the plaintiff should have given notice of her intention to let the premises.

Rule refused.

BEFORE BEST, C. J. AND PARK, BURROUGH, AND
GASELEE, JS.—At Bar.

RICHARD TOOTH, Demandant; JOHN BAGWELL, Tenant.

April 17th.

WRIT OF RIGHT (a)—The Usher of the Court made proclamation. Mr. Secondary *Griffiths* then called the Jury.—Sixteen appeared, five of whom were Knights, and the remainder, Esquires.—He then administered the oath to each juror separately as follows:—

On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin.

The demi-mark may be tendered either at the joining of the mise or at the swearing of the grand assize; and if it has been done at the joining of the mise, it is

“ I ——— do swear that I will say the truth whether
“ John Bagwell hath more near right to hold the tene-
“ ments, which Richard Tooth demands against him by
“ his writ of right, or the said Richard Tooth to have

too late, at the time of trial, for the demandant to take the objection. An examined copy of an answer in Chancery, by a person not party to the action, is evidence; and it is not necessary to produce the original, or prove the hand-writing of the party.

(a) See *ante*, p. 187, for the previous parts of this case.

1826.
 {
 TOOTH,
 Demandant;
 BAGWELL,
 Tenant.

“ them as he demandeth, and for nothing to let, but to say
 “ the truth—So help me God.”

Wilde, Serjt., for the tenant, then opened the pleadings.

Vaughan, Serjt., who was also for the tenant, then submitted, that as the demi-mark had been tendered, the demandant should be required, in the first instance, to shew the seisin of his ancestor.

BURROUGH, J. mentioned a case of *Luke v. Harris* (b), in which the demi-mark had been tendered, and yet the Court held that the tenant ought to begin.

Vaughan, Serjt.—The object of tendering the demi-mark is to raise the question.

GASELEE, J.—There was a case of *Dalton v. Harvey*, tried in *Dorsetshire*, in which the practice mentioned by my brother *Burrough* was acted on. I thought at first that it was contrary to common sense, but on looking into the facts, I found that it was not so; for it became a question, whether the seisin was not a mere permission of the other party; and if that course had not been adopted, the case must have been gone into twice. It was said in the case I allude to, that it had been ruled in *Luke v. Harris*, that the tenant ought to begin.

BEST, C. J.—It having been once decided, I shall act upon that decision. One decision is enough upon such a point as this.

Vaughan, Serjt., mentioned the cases of *Hardman v. Clegg* (c), and *Throgmorton v. Broker* (d).

(b) 2 Bl. 1261, 1293. (c) 1 Holt N. P. C. 657. (d) Booth, 98

BEST, C. J.—*Luke v. Harris* does not appear to have been referred to there.

1826.
 }
 TOOTH,
 Demandant;
 BAGWELL,
 Tenant.

The Court then decided that the tenant should begin.

Vaughan, Serjt. then addressed the grand assize, and established a case of possession for some years, on the part of the tenant.

Bosanquet, Serjt., for the demandant.—There is a question in this case, whether the demi-mark has been tendered at the proper time. The utmost effect to be produced by it is, to call upon the demandant to shew that Tooth, under whom he claims, was seised in the course of the reign of the late King George III. It is said by one of the Judges that the demi-mark is of no consequence, as the demandant must prove seisin without it. But this is contrary to the practice. The statute of the 32 H. VIII. c. 62, s. 6, says, that if any persons sue, &c. for any manors, lands, &c. and cannot prove that they or their ancestors were in actual possession or seisin within the time limited by that act, if the same be traversed or denied, it shall be a bar. The statute is not pleaded, there is no traverse of the seisin here; if it had been, it would have been tried, as a collateral issue, by twelve jurors in the common way. It is said in *Booth on Real Actions*, pp. 98, 99, that the time of tendering the demi-mark is at the period of swearing the grand assize, which in this case has not been done. There never was an instance in which the demandant was called on to prove seisin, when the demi-mark had not been tendered at the time of the trial. *Andrews v. Cromwell* (e), referred to by Serjeant Hill, in his notes on *Booth*.

BEST, C. J.—Does not that mean that the demi-mark may be tendered at the joining of the mise, but that, if

(e) Moore, 762.

1826.
 TOOTH,
 Demandant;
 BAGWELL,
 Tenant.

it is omitted then, it will be in time if it be done at the swearing of the grand assize.

GASELEE, J. was of opinion that the demandant should have urged the objection at the time, instead of joining in the mise. His Lordship stated, that, in the Dorchester case, the demi-mark was tendered at the joining of the mise, and not at the time of the trial.

BURROUGH, J., concurred in the opinion that it was too late to make the objection.

The Court then disallowed it, and the demandant went into his case.

In the course of the proof it became necessary to read certain extracts from an answer in a suit in Chancery, of Sir John St. Aubyn, Bart., and an *examined copy* was proposed to be put in evidence.

Wilde, Serjt., objected that as Sir John St. Aubyn was not a party to the action, the original answer must be produced, and his hand-writing proved.

Taddy, Serjt., mentioned a case of *The Countess of Dartmouth v. Roberts* (f).

BEST, C. J.—Where a man is a party to the suit, there the identity is known; but in this case the hand-writing of the party should be seen; it may be material as to the question of identity.

Taddy, Serjt., then cited the case of *Hennell v. Lyon* (g).

GASELEE, J., mentioned a case tried on the Western circuit, in which a person from the Court of Chancery proved that that Court would not suffer the original answer to be taken to Nisi Prius, unless in a case of perjury.

(f) 16 East, 336.

(g) 1 B. & A. 182.

The Court after some further discussion yielded to the authority of *Hennell v. Lyon*, and received the copy in evidence, without proof of the hand-writing of the party to the original answer.

1826.
 Toom,
 Demandant;
 Bagwell,
 Tenant.

The demandant then went on with his case, but being unable to deduce his title in a regular order the tenant succeeded.

Bosanquet and Taddy, Serjts., for the demandant.

Vaughan and Wilde, Serjts., for the tenant.

[Attornies—*Hallett & H.*, and *Lane*.]

*Sittings at Westminster, after Easter
 . Term, 1826.*

MERLE and Another, Assignees of Brooks, v. MOORE.

May 9th.

ASSUMPSIT for goods sold. A deed, dated the 30th February, 1822, between Brooks and the defendant, assigning all Brook's property to the defendant, in fraud of his creditors, was put in as evidence of an act of bankruptcy by Brooks. And his former attorney was called, and asked as to the circumstances in which his client was at the time the deed was executed. His knowledge of those circumstances appeared to have been derived from communications made to him by Brooks, in his character of an attorney.

In an action by the assignees of a bankrupt, communications made by the bankrupt to his attorney may be given in evidence, to prove the act of bankruptcy, if the bankrupt consents; and it does not lie in the mouth of the defendant to take the objection to their disclosure.

Vaughan and Lawes, Serjts., submitted that these were confidential communications, and could not be inquired into.

Wilde, Serjt.—The objection does not lie in the mouth of the defendant.

1826.
 MERLE
 v.
 MOORE.

Vaughan, Serjt.—The law raises the confidence, and the attorney is estopped from making the disclosure.

BEST, C. J.—It is not in your mouth to make the objection. It is for the bankrupt to object, and if he does not, I shall receive the evidence.

Vaughan, Serjt.—This is incidentally making the bankrupt a witness to support his commission; it is Brooks speaking through the mouth of his attorney.

BEST, C. J.—It only removes an objection, it does not give effect to what is not evidence.

Verdict for the Plaintiffs.

Wilde, Serjt., and *F. Pollock*, for the plaintiffs.

Vaughan and *Lawes*, Serjts., for the defendant.

[Attornies—*Mayhew*, and *Crofts*.]

Sittings in London, after Easter Term, 1826.

May 10th.

SMITH v. COOK and Another.

If the miller to a vendor of corn receive an order from such vendor to deliver a quantity of flour to the vendee, and actually deliver a part under several sub-orders from the agent of the vendee, and afterwards refuse to deliver the remainder, on the ground of his having no more of the vendor's flour in his possession, the vendee may maintain trover against him, and will not be put to bring a special action of assumpsit on an implied promise to deliver the whole.

TROVER for thirty-nine sacks of flour. On the 25th November, 1825, the plaintiff bought two hundred sacks of flour, of Messrs. Harvey and Hill, who gave a delivery order, addressed to the defendants, who were millers, and had large premises attached to their mill, in which flour was deposited, requiring them to deliver two hundred sacks to the plaintiff. This order was served upon the defendant's foreman, who, when he received it, said "very well."

On the ground of his having no more of the vendor's flour in his possession, the vendee may maintain trover against him, and will not be put to bring a special action of assumpsit on an implied promise to deliver the whole.

It appeared, that one hundred and sixty-one sacks had been delivered on orders, signed by a Mr. Bull, who was the agent of the plaintiff; but when the order for delivery of the remainder was presented, it was not attended to, in consequence, as was said by the defendants, of their not having any more flour of Harvey and Hill's in their possession.

1826.
SMITH
v.
COOK.

Adams, Serjt., for the defendants, submitted that the plaintiff should be nonsuited. He has mistaken his form of action. Suppose the order received by the defendants is binding on them, and raises a promise to deliver the whole two hundred, whether they were in their possession or not, yet the form of action must be assumpsit for non-performance of the promise, and not trover, which cannot be maintained without possession of the article. There is no evidence of the defendants having more flour than they delivered.

BEST, C. J.—I think there is evidence to go to the Jury for them to say, whether there were not at one time two hundred sacks of flour belonging to the plaintiff in the hands of the defendants, which they thought proper to undertake to deliver; and I am of opinion, that the plaintiff, under these circumstances, is not obliged to bring a special action of assumpsit.

Adams, Serjt., then addressed the Jury.—The defendants are not wharfingers, nor warehousemen, but millers only, who receive corn to be ground. The order was accepted by the defendants, on the idea that there would be enough in their possession to execute it. They have done their duty as millers, and ought not to be concluded by the mere circumstance of receiving the order given for the delivery of the whole number.

BEST, C. J.—In my opinion there is no defence to this action. You must certainly be satisfied that two hundred sacks of flour were in the custody of the defendants, as

1826.

SMITH

v.
COOK.

millers to Harvey and Hill. And I think there is abundant evidence of that. The moment they deliver any part under the sub-orders, do they not admit that they had the whole quantity? It is true, that there is no proof of any one's having seen the corn upon the premises, but that is not conclusive. Trade could not go on, if the facts which have been proved were not to be considered as evidence of possession.

Verdict for the plaintiff.

Wilde, Serjt., and *Evans*, for the plaintiff.

Adams, Serjt., and *Alderson* for the defendants.

[Attornies — — — and — — —.]

Adjourned Sittings at Westminster after Easter Term, 1826.

May 11th.

MACDOUGALL v. YOUNG.

Evidence is admissible in an action for tithes on stat. 37 H. 8, of the fact of some of the parishes in London paying at the rate mentioned in the decree, made by virtue of that statute, in order to raise a presumption that such decree had been enrolled, no entry of such enrolment being to be found; a copy of the decree annexed to the statute, in a printed copy obtained from the King's printer, being produced.

DEBT for tithes. The first count in the declaration stated, that in and by a certain Act of Parliament, made in the 37th year of the reign of King Henry VIII., intituled "An Act for Tithes in London," it was among other things enacted, that such end, order and direction as should be made, decreed, and concluded by the Right Reverend Father in God, Thomas, then Archbishop of Canterbury, the Right Honourable Lord Wrythesly, then Lord Chancellor of England, and (several other persons naming them), or any six of them, before the 1st day of March then next ensuing, of, for, and concerning the payments of the tithes, oblations, and other duties within the city of London, and the liberties of the same, and enrolled in the King's High Court of Chancery of record, should stand and remain, and be as an Act of Parliament, and should bind as well all citizens and inhabitants of the said city and liberties, as the parsons, &c. of the said city, and their successors for

1826.

M'DOUGALL

v.
YOUNG,

ever, according to the effect, purport, and intent of the said order and decree so to be made and enrolled. The declaration then averred, that afterwards, and before the said 1st day of March, to wit, on the 24th day of February, 1545, it was fully ordained and decreed, by the said Right Reverend Father, &c. that the citizens and inhabitants of the said city of London, and the liberties of the same for the time being, should yearly, without fraud or covin, for ever pay their tithes to the parson, &c. after the rate therein following, that is to say, of every 10s. rent by the year, of ~~all~~ and every house, &c. 16^d., and of every 20s. rent by the year, 2s. 9^d., and so above the rent of 20s. by the year, ascending from 10s. to 10s., according to the rate aforesaid. The declaration then alleged, that the said order and direction, or decree, was afterwards, and before the commencement of the suit, duly enrolled in the King's High Court of Chancery of Record, but that the ~~same~~ had since been lost by time and accident. There was also an averment of the plaintiff's title to sue as a person seised in fee of the impropriate rectory of the parish of St. Helen, Bishopsgate, within the city of London, and also of the defendant's liability to pay, as the inhabitant of a house in that parish. The second and third counts were for tithes bargained and sold; the fourth count was on a composition to pay 12l. 12s. a-year: and there were also the common money counts.

The pleas were, 1st, the general issue, *nil debet*; 2nd, a plea alleging, that under the statute no action could be maintained at law; 3rd, a plea to nearly the same effect; 4th, a plea that the decree had not been enrolled in manner and form as averred in the declaration. To the 2nd and 3rd pleas the plaintiff demurred (a), and joined issue upon the 1st and 4th.

(a) In the case of *Skidmore v. Bell*, 3 Eag. & Y. Tithe Ca. 1202, a prohibition was granted to the Chancellor of the Diocese of London, on the ground that he had no

jurisdiction of tithes under this statute; but in the case of *Watts v. Warren*, 3 Gwill. 1054, and 3 Eag. & Y. Tithe Ca. 1202, a plea to the jurisdiction of the Court of

1826.
 M'DOUGALL
 v.
 YOUNG.

A printed copy of the Act declared upon, obtained from the King's printers, was produced in evidence. It had annexed to it a printed copy of what purported to be the decree in question. And a witness proved that he had searched at the Rolls Chapel and could not find the original decree there. Witnesses were then called to prove, that in some parishes in London some persons paid the 2s. 9d. according to the supposed decree.

Wilde, Serjt., objected.—Proof of what is done in one parish is not evidence to affect persons in another.

Onslow, Serjt., relied on an *Anonymous* case in 2 Ventris, 257 (b); *Thurston v. Slatford*, 1 Salk. 184 (c); and the case of *Knight v. Dauler* (d).

Exchequer, on a bill filed there for tithes under this statute, was overruled; and in the case of *The Canons of St. Paul v. Crickett*, 2 Ves Jun. 563, the Lord Chancellor held, that the Court of Chancery had original jurisdiction on bill filed, without first applying to the Lord Mayor, saying that an Act of Parliament, creating a special jurisdiction, never ousts the jurisdiction of Westminster Hall without special words.

(b) Ejectment on a trial at bar for lands in ancient demesne, in which there was shewn a recovery in the court of ancient demesne, to cut off an entail which had been suffered long before, and the possession had gone accordingly. The recovery itself was not produced, because it had been lost, nor was any copy of it given in evidence. The Court admitted other proof, saying, "If a record be lost, it may be proved to a Jury by testimony, as the de-

cree in Hen. VIII.'s time for tithes in London is lost, yet it hath been often allowed that there was one."

(c) Mich. 12 Wm. III. B. R.—*Assumpsit* in C. B. for 5l. received to plaintiff's use, being fees of the office of clerk of the peace of Oxfordshire. On *non assumpsit*, it was insisted that the plaintiff had forfeited his office by not taking the oaths required by law. To prove this fact, the record of the sessions was produced. To this evidence a bill of exceptions was tendered, which was removed into K. B. with the record, by writ of error; and *Holt*, C. J., held, that the record was evidence, saying, *inter alia*, "that, indeed, if there be a mis-entry, it might be supplied and corrected by other evidence, for a party should not be concluded by the mistake or negligence of the officer."

(d) Hardr. 323.—"In *ejectione firmæ*, for the rectory of Burgh field. Upon a demise for years

BEST, C. J.—I think the evidence is admissible. It is quite clear that the decree has been treated as enrolled, in the city. I do not receive the evidence of what is done in one parish as proving the custom in another. But it is proved, that in the printed statute book there is a copy of this decree, and I receive the evidence of payment as collateral proof of that which had been enrolled. Is the right of a party to be lost through the negligence of public officers? We must look to the evidence. It appears that different parishes have paid tithes in conformity with the decree; and in a case in which it became necessary to shew a recovery in ancient demesne, the original being lost, other proof of its having been suffered was received in evidence.

The witnesses were then examined, but their evidence was not satisfactory in proving any uniform practice. On the contrary, it tended to shew, that although the claim of 2s. 9d. was paid by some, yet its legality was disputed by others. Evidence was also given to shew, that the defendant was under an agreement to pay 12l. 12s. a-year as a composition. The title of the plaintiff as impropriator was also proved.

Wilde, Serjt., for the defendant. The plaintiff alleges a right to 2s. 9d. in the pound, under a decree made in pursuance of the stat. of Hen. VIII. I submit, that no such decree was made and enrolled in pursuance of that statute.

and a trial at bar, the case, upon evidence, appeared to be, that the Earl of ———, being a popish recusant convict, had presented the lessor; who thereupon was instituted and inducted into the said rectory. But the record of the conviction was burnt, as was supposed, amongst other records of the same nature in the Inner Temple; wherefore the defendant offered to prove it by other evidence. And it was held, by

Hale, C. B., and the whole Court, that in such a case as this a record may be proved by evidence, because the conviction here is not the direct matter in issue, but is only inducement to it; as, if an appropriation were in issue, the King's licence, if it could not be found upon record, might be proved in evidence without shewing a record of it, although it be the foundation of the appropriation."

1826.
M'DOUGALL
v.
YOUNG.

1826.
 {
 McDougall
 v.
 Young.

There is no evidence of it. The document produced, I admit, is printed by the King's printer, and attached to the Act of Parliament, as if it were the decree. But that originated in the mistake of a learned person (*Rastal*), who, in making an edition of the statutes, supposed that this document was the decree made under the statute, and, therefore, appended it to the statute. If a copy of it, contemporaneous with the act, had been produced, that might have been strong evidence of its existence. And even if there was a decree, to have binding force, it must have been enrolled. Now, has this supposed decree been enrolled? If it has, why has the claim lain dormant for years, and even centuries? Why was it not enforced about the time when the decree was made? There is not the slightest evidence of the enrolment. Nothing of the sort is to be found in the enrolment office; and as to the evidence of persons having paid at the rate claimed, that is easily accounted for, as some would rather submit to a demand of that sort than involve themselves in a lawsuit. Others, it appears, are actually contesting the point.

BEST, C. J., left these two points to the Jury. 1st, Whether they were satisfied that a decree had been made in pursuance of the statute of Hen. VIII.? and if so, whether that decree had been enrolled? And, 2nd, Whether the defendant had entered into an agreement of composition?

The Jury found that they were not satisfied that the decree was duly made and enrolled, but that the defendant was under terms of composition.

Verdict for the plaintiff on the fourth count,
 and for the defendant on all the others.

Onslow, Serjt., and *Henderson*, for the plaintiff.

Wilde, Serjt., and *Patteson*, for the defendant.

[Attornies—*Macdougall & Co.*, and *T. M. Vickery*.]

ON the second day of the following Trinity Term, *Onslow*, Serjt., moved for a new trial. He cited *Ivatt v. Warren*, in the time of James I., reported in *Gwillim*, 1054; *Western on the Tithes of London*; and the case of *Ward v. Hilder*, *Gwillim*, 588; and *Wood's Exchequer Cases*, p. 305; and relied on the circumstance of no point having been made in any of those cases about the enrolment of the decree.

1826.
M'DOUGALL
v.
YOUNG.

The Court granted a rule to shew cause (c).

(c) This rule has not yet been argued.

On the subject of tithes in London, see the stat. 37 Hen. VIII. c. 12, and the copy of the decree which immediately follows it; and also 2 Inst. 659; and the following cases, *Green v. Piper*, Cro. Eliz. 276; and 1 Eag. & Y. Tithe Ca. 105. *Langham v. Baker*, Hard. 116, 130; and 1 Eag. & Y. Tithe Ca. 428. *Anon.* 1 Gwill. Tithe Ca. 285. *Dunn v. Burrell & Goffe*, 1 Eag. & Y. 270; and 1 Gwill. 299. *Sheffield v. Pierce*, 2 Gwill. 503; and 1 Eag. & Y. Tithe Ca. 421. *Ward v. Hilder*, 2 Gwill. 538; and 1 Eag. & Y. 576. *Sayer v. Mumford*, 2 Gwill. 546; and 1 Eag. & Y. 587. *Kynaston v. Miller*, 3 Gwill. 903; and 2 Eag. & Y. 196. *Bramston v. Heron*, 4 Gwill. 1314; and 3 Eag. & Y. 1359. *Bennett v. Treppas*, 2 Gwill. 633; and 1 Eag. & Y. 782. *The Warden and Minor Canons of St. Paul's v. Crickett*, 2 Ves. Junr. 563; and 2 Eag. & Y. 417. *Same v. Morris*, 9 Ves. 155; and 2 Eag. & Y. 516. *Antrobus v. The East India Company*, 13 Ves. 9; and 2 Eag. & Y. 544. *The Minor*

Canons of St. Paul's v. Kettle, 2 Ves. & B. 1; and 2 Eag. & Y. 666. *The Warden and Minor Canons of St. Paul's v. The Bishop of Lincoln*, 4 Price, 65; and 3 Eag. & Y. 809. *The Minor Canons of St. Paul's v. Crickett*, 5 Price, 15; and 3 Eag. & Y. 866: and *Owen v. Nodin*, 1 M'Clelland, 239; and 3 Eag. & Y. 1149.

In Haithby's edition of the Statutes at Large, there is the following note immediately after the stat. 37 Hen. VIII. c. 12, and the decree:—"N. B. This decree is not entered on the statute-roll of this year in Chancery; nor has it been found enrolled on any other roll in Chancery; nor is it annexed to the bill in the Parliament Office. It was not inserted in the earliest printed editions of the statutes. It is printed in Rastal's Abridgment of the Statutes, (edit. 1579; Title, Tithes), and in Palton's Stat. at Large, printed in 1618." However, on a reference to the authorities above cited, it will be found that several decrees in the Courts of Chancery and Exchequer have been made for payment according to it.

1886.

May 19th.

SELICK v. SMITH and Others.

In an action of trover brought against the Treasurer of the West India Dock Company, for refusing to deliver articles deposited in the West India Docks, he is entitled to the protection of the Dock Act, which requires that actions for any thing done in pursuance or under colour of that act should be brought within three months. And the circumstance of his having taken a bond of indemnity, is not a waiver of such protection.

TROVER for a quantity of sugar, which a person named Pettit, to whom it had been consigned by the plaintiff, had pledged with two of the defendants, named Keeling and Drake. The other defendant, Smith, was the treasurer of the West India Dock Company (*a*), in whose possession the sugar was, and who had refused to deliver it to the plaintiff's order, and for which refusal he was indemnified by Messrs. Keeling and Drake.

Bosanquet, Serjt., who appeared for Mr. Smith, submitted that he was entitled to a verdict, on the ground that the action had not been brought within three months, as required by the West India Dock Act (*b*). He cited *Wallace v. Smith* (*c*).

Vaughan, Serjt.—This is a case in which the statute does not apply, the act done must be one done in the execution of the statute itself (*d*).

BEST, C. J.—At present, I think the Dock Company are within the protection of the statute, but I will give you leave to move to enter a verdict for the plaintiff.

Vaughan, Serjt.—Does not your Lordship think, that the indemnity given so identifies Mr. Smith with the act of the other defendants, as to be a waiver of his protection under the statute.

BEST, C. J.—I think not. I think that Mr. Smith did

(*a*) The Dock Act requires that the Company shall sue and be sued in the name of their Treasurer.

(*b*) 39 & 40 Geo. 3, c. 69, s. 185.

(*c*) 5 East, 115.

(*d*) The words of the statute are, "for any thing done in pursuance or under colour of this act."

right in taking an indemnity. The Dock Company are so much dependant upon servants, that if parties were not to bring actions within a reasonable time, they would not be able to defend themselves.

1826.
SELICK
v.
SMITH.

A verdict was taken for Mr. Smith, with leave to *Vaughan*, Serjt., to move to enter a verdict for the plaintiff against him; and the verdict was for the plaintiff against the other two defendants; which verdict for the plaintiff was, after argument on a rule nisi for a nonsuit, confirmed by the Court.

Vaughan and *Taddy*, Serjts., and *F. Pollock*, for the plaintiff.

Bosanquet, Serjt., for the defendant *Smith*.

Wilde, Serjt., and *Jeremy*, for the defendants *Keeling* and *Drake*.

[Attornies *Swin & Co.*, and *Freshfield & Co.*]

In the course of the ensuing Term, *Vaughan*, Serjt., moved, pursuant to the leave given at the trial, to enter a verdict for the plaintiff against the defendant *Smith*; but the Court were of opinion that he was entitled to the protection of the act, and therefore refused a rule.

1826.

Adjourned Sittings in London, after Easter Term, 1826.

May 23d.

CLARKE v. KING.

In assumpsit on an agreement to transfer a public-house, and assign the licences, the parties binding themselves in a penalty for the performance of the terms, if the vendor could not assign the licences, and the vendee had not the money ready at an appointment to settle the business, the penalty cannot be recovered; but if the vendee has paid a deposit, it may be recovered back.

A cheque upon a brewer's house is not sufficient in such a case, if tendered in payment, though it be proved to be the constant practice to use cheques instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public-houses.

ASSUMPSIT; with a special count on an agreement, and the money counts.

The agreement was for the transfer by the defendant to the plaintiff of a public-house, together with the lease, and also for assignment of the licences. A deposit of 40*l.* had been paid by the plaintiff, and both parties bound themselves in the sum of 100*l.* each for the performance of the agreement. An appointment was made to settle the business, which was attended by a clerk of Messrs. Combe and Co., the brewers, who had agreed to advance a part of the purchase-money to the plaintiff: but he had not with him the sum required *in cash*, but only a cheque on the house. It was stated, that this was the practice in almost every instance, in order to prevent robbery, as the business was usually transacted at very late hours.

BEST, C. J.—If it was necessary that the plaintiff should have the money ready, I am clearly of opinion that the cheque of the most respectable house in London will not do.

It appeared that the defendant was not in a condition to assign the licences to the plaintiff.

Vaughan, Serjt., for the defendant, relied on the circumstance of the plaintiff's not being ready to pay in cash, as an answer to the action.

Wilde, Serjt., contended, that as the defendant was not in a situation to assign the licences, it was not incumbent

on the plaintiff to have the money ready, as it could never be deemed necessary for a party to do a nugatory act.

1828.
CLARKE
v.
KING.

BEST, C. J.—The question is, whether you can maintain your action for the penalty? I think you cannot, as you had not the money ready at the instant.

Wilde, Serjt., submitted, that the plaintiff was entitled to recover back the deposit.

Vaughan, Serjt., contended that he was not.

BEST, C. J.—It appears to me, that neither plaintiff nor defendant were in a condition to perform the agreement. They have been making a bargain which could not be carried into effect without their doing more than either of them has done. I think, as the defendant was unable to perform that part of the agreement by which he undertook to assign the licences to the plaintiff, that the contract is at an end, and the plaintiff is entitled to recover his deposit.

Verdict for the plaintiff—Damages 40*l*.

Wilde, Serjt., and *Patteson*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Vincent*, and *Parnell*.]

1826.

COURT OF KING'S BENCH.

Sittings at Westminster, after Trinity Term, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

June 15th.

BOOTH v. HANLEY and Others.

If a party be turning towards the wall in a street at night, for a particular occasion, a watchman is not justified in collaring him, to prevent his so doing.

ASSAULT and false imprisonment. Plea—General issue. (There were also several justifications, but they were not proved).

The defendant Hanley was a police officer; and it appeared, that at about half-past ten o'clock on the night of the 1st of October, 1825, the plaintiff was in Paul-street, Finsbury, and that he was turning to the wall for a particular occasion, when a watchman came up to him and collared him; and on this, a scuffle ensuing between the plaintiff and the watchman, the defendant Hanley came up, and (with the other defendants) took the plaintiff to the watch-house of St. Leonard, Shoreditch, where he was locked up.

ABBOTT, C. J. (in summing up the case to the Jury)—The watchman certainly had no right to go up to a man and collar him for that which the plaintiff appears to have been doing. He might have gone up to him and remonstrated with him, or have asked him to go somewhere else; but he clearly had no right to assault him for that.

Verdict for the plaintiff—Damages 20*l*.

Scarlett, C. Phillips, and E. Quin, for the plaintiff.

Denman and George, for the defendants.

[Attornies—*Harmer*, and *Amory & C.*]

1826.

June 16th.

DOE, on the demise of UBELE, v. KILNER.

EJECTMENT for a small piece of land in the parish of Christ-church, Spitalfields.

The lessor of the plaintiff claimed the land in question as part of his freehold, to which it adjoined.

To shew his title, a clerk of the attorney for the lessor of the plaintiff proved, that he had carefully searched among the deeds and papers of the lessor of the plaintiff, and could not find any deeds of lease and release of the dates of the 23d and 24th of May, 1735. The witness then produced an examined copy of the registry of those deeds, taken from the original registers of them in the registry-office in the county of Middlesex.

These copies were put in and read as secondary evidence of the deeds. No objection being made to their admissibility on the part of the defendant.

The case was referred.

Denman and Carrington, for the lessor of the plaintiff.

Chitty and C. Sheppard, for the defendant.

[Attornies—*Murray & Son*, and *Harman*.]

Registers of all deeds, conveyances, and wills, affecting real property in the county of Middlesex, are made in pursuance of the stat. 7 Ann. c. 20; by the 1st section of which it is enacted, "That a memorial of all deeds and conveyances, which from and after the 29th day of September, in the year of our Lord, 1709, shall be made and executed, and of all wills and devises in writing, made or to be made and published, where the devisor or testatrix shall die after the said 29th day of September, of or concerning, and whereby

any honors, manors, lands, tenements, or hereditaments in the said county, may be any way affected in law or equity, may be registred in such manner as is hereinafter directed; and that every such deed or conveyance, that shall at any time after the said 29th day of September be made and executed, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registred as by this act is directed, before the registering of the memorial of the deed or

An examined copy of the registry of a deed in the registry of the county of Middlesex, is admissible as secondary evidence of its contents.

1826.

Doe
v.
KILNER.

conveyance under which such subsequent purchaser or mortgagee shall claim; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registred at such times and in such manner as is hereinafter directed." By the 5th and 6th sections of the same statute, it is enacted, "That all and every memorials, so to be entered and registred, shall be put into writing in vellum or parchment, and brought to the said office, and in case of deeds and conveyances shall be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance; which witness shall, upon his oath before one of the said registers, or masters, or before a Master in Chancery, ordinary or extraordinary, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial; and in case of wills, the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof shall, upon his oath before the said registers or masters, or before such Master in Chancery as aforesaid, prove the signing and sealing of such memorial; which respective oaths the said registers or masters, and Masters

in Chancery, are hereby empowered to administer, and shall indorse a certificate thereof on every such memorial, and sign the same."—"That every memorial of any deed, conveyance, or will, shall contain the day of the month and the year when such deed, conveyance, or will bears date, and the names and additions of all the parties to such deed or conveyance, and of the deviser or testatrix of such will, and of all the witnesses to such deed, conveyance, or will, and the places of their abode, and shall express or mention the honors, manors, lands, tenements, and hereditaments contained in such deed, conveyance, or will, and the names of all the parishes, townships, hamlets, precincts, or extraparochial places within the said county, where any such honors, manors, lands, tenements, or hereditaments are lying or being, that are given, granted, conveyed, devised, or any way affected or charged by any such deed, conveyance, or will, in such manner as the same are expressed or mentioned in such deed, conveyance, or will, or to the same effect; and that every such deed, conveyance, and will, or probate of the same, of which such memorial is so to be registred as aforesaid, shall be produced to the said registers or masters at the time of entering such memorial, who shall indorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time on which such memorial is so entered or registred, expressing also in what book, page, and number the same is entered; and that the said

registers or masters shall sign the said certificate when so indorsed; which certificates shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever; and that every page of such register books, and every memorial that shall be entered therein, shall be numbered, and the day of the month, and the year, and hour, or time of the day when every memorial is registred, shall be entered in the margents of the said register books, and in the margents of the said memorial; and that every such register or master shall keep an alphabetical kalendar of all parishes, extraparochial places and townships within the said county, with reference to the number of every memorial that concerns the honors, manors, lands, tenements, or hereditaments in every such parish, extraparochial place or township respectively, and of the names of the parties mentioned in such memorials; and that such register or master shall duly file every such memorial in order of time as the same shall be brought to the said office, and enter or register the said memorials in the same order that they shall respectively come to his hands." And to prevent the falsification of these registries, it is by the 15th sect. enacted, "That if any person or persons shall at any time forge or counterfeit any entry of the acknowledgment of any such memorial, certificate, or in-

dorsement, as is herein mentioned or directed, and be thereof lawfully convicted, such person or persons shall incur and be liable to such pains and penalties as in and by an act made in the fifth year of Queen Elizabeth, intituled, *An act against forgers of false deeds and writings*, are imposed upon persons for forging and publishing of false deeds, charters or writings, sealed court rolls or wills, whereby the freehold or inheritance of any person or persons of, in or to any lands, tenements, or hereditaments shall or may be molested, troubled, or charged; and that if any person or persons shall at any time forswear himself before the said registers or masters, or before any Judge, or Master in Chancery, in any of the cases herein mentioned, and be thereof lawfully convicted, such person or persons shall incur and be liable to the same penalties as if the same oath had been made in any of the courts of record at Westminster." This species of secondary evidence is not often resorted to; but it is accessible to every body. The memorial does not contain every thing that is contained in the deed, but it often happens that it may contain what a party wants to prove. As to the registry of deeds in the county of York, see the stat. 2 & 3 Ann. c. 4; 5 & 6 Ann. c. 18; 6 Ann. c. 35; and 8 Geo. 2, c. 6.

1826.

DOE
v.
KILNERR.

1826.

June 16th.

FLEMINGTON v. SMITHERS.

If the plaintiff's son, who was in fact his servant, in delivering parcels from a stage-coach, receive an injury, by which the father is deprived of his services, the father is not entitled, as part of the damages in an action for loss of his son's service, to have a compensation for the injury done to his parental feelings.

CASE by the plaintiff, the proprietor of a stage-coach, against the defendant, the owner of a waggon, for the negligence of his servant in driving the waggon, whereby the plaintiff's son and servant was thrown off the plaintiff's coach and injured, *per quod servitium amisit*. Plea—General issue.

It appeared, that the plaintiff's son delivered parcels for the plaintiff, who acted as coachman to his own coach; and the son, who was a lad of about fifteen, was paid half the parcel-money by his father as wages. At the time of the accident he was thrown off the coach, and being much injured, he was taken to an hospital, where his mother took him clean linen, and such things as were not there provided.

The defence was, that there was no negligence in the defendant's servant.

Marryat, in reply, contended, that if the plaintiff recovered, the mere loss of service ought not to be the measure of damages; but that, as the party in question was the son as well as the servant of the plaintiff, the Jury ought to give a further compensation for the injury to the plaintiff's parental feelings, the same as in cases of seduction, which were, in point of form, actions for loss of services like the present.

ABBOTT, C. J. (in summing up).—With regard to the amount of damages, I should tell you, that this action is brought to recover such sum as you (the Jury) may think the plaintiff entitled to for the loss of the services of his son. You ought, therefore, if you find for the plaintiff, to find for such reasonable sum as to you appears proper for the loss the plaintiff has sustained in being deprived of the assistance of his son, and also the expense he must

have been put to by his being out of his place, and also some small compensation for his mother going to visit him as she did. But beyond those things, it appears to me, that you ought not to go in your estimate of damages.

1826.
FLEMINGTON
v.
SMITHERS.

Verdict for the plaintiff—Damages 20*l*.

Marryat and Gunning, for the plaintiff.

Scarlett and Andrews, for the defendant.

[Attornies—*Brill*, and *Horsly*.]

With regard to actions for seduction, in the case of *Chambers v. Irwin*, tried at the Bristol Assizes, 1800, (2 Selw. N. P. 1100), it was laid down by Lord *Elden*, that the Jury, in calculating the quantum of damages, were not to look merely to the loss of service, which might amount only to a few pounds, but also to the wounded

feelings of the party. However, in the case of *Irwin v. Dearman*, Lord *Ellenborough* said, that it had always been considered as an action *sui generis*, where a person standing in the relation of a parent, or in *loco parentis*, is permitted to recover damages for an injury of this nature *ultra* the mere loss of service.

PROMOTIONS.

IN this Vacation, Sir *John Singleton Copley*, Knt. his Majesty's Attorney-General, was appointed Master of the Rolls, *vice* Lord *Gifford*, deceased.

Sir *Charles Wetherell*, Knt. was appointed Attorney-General, *vice* Sir *J. S. Copley*.

Nicholas Conyngham Tindal, Esq. was appointed Solicitor-General, *vice* Sir *C. Wetherell*.

Charles Christopher Pepys, Esq. was appointed one of his Majesty's counsel learned in the law.

1826.

COURT OF KING'S BENCH.

*Adjourned Sittings at Guildhall, after Trinity
Term, 1826.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

Oct. 10th.

SAUNDERS v. MUSGRAVE, Bart.

If an agreement for the assignment of a piece of ground, on payment of a sum of 1260*l.*, contain a clause, that the party agreeing to take the assignment shall pay and allow, at the rate of 100*l.* per annum, from the time of taking possession until the completion of the purchase, in equal half yearly payments; a sheriff, on a writ of *fi. fa.*, ought not, under such clause, to treat the 100*l.* as rent, and deduct it out of the proceeds of the execution.

ASSUMPSIT for money had and received. From the admissions in the cause, it appeared that a writ of *fi. fa.*, at the suit of the plaintiff, against a person named Mohun, was delivered to the defendant, who was High Sheriff of Gloucestershire, in October, 1825. The defendant sold under the writ, and paid to a person named Tucker, a sum of 50*l.*, which, it was alleged, he was entitled to demand as half a-year's rent, which became due in the previous month of July, under an agreement dated the 22d December, 1824. By the agreement, Tucker undertook that he would assign to Mohun a certain plot of ground, with a house, &c. for the residue of a term of years for which he held them, on the payment of a sum of 1260*l.* The clause on which the defendant relied was in the following terms:—“And it is agreed, that in the mean time, and until the said assignment be made, he, the said H. M. Mohun, shall pay and allow unto the said Joseph Tucker, at the rate of 100*l.* per annum, from the time of taking possession of the said premises until the completion of the said purchase, in equal half yearly payments.”

Mohun was called as a witness, and proved that he went into possession of the premises on the 9th or 10th of January, 1825; that a room which was to have been built in the month of March ~~was not built~~ at all: that he had to put in stoves which ought to have been supplied by Tucker,

for which Tucker was to pay him 12*l.*; in addition to which he had advanced him a sum of 10*l.*

1826.
SAUNDERS
&
MUSGRAVE.

Marryat, for the plaintiff, referred to the case of *Dunk v. Hunter*, 5 B. & A. 322 (a).

Campbell for the defendant.—In *Dunk v. Hunter*, there was no rent specified to be paid in the mean time; but in this case there is a specific sum of 100*l.* a-year to be paid.

ABBOTT, C. J.—The question is, whether it is to be considered as rent, or to be taken into account afterwards? It would make a great difference to the parties. For 100*l.* would considerably exceed the interest. The words of the agreement specify both the sum and the time. It seems to me that there is no fact to be left to the Jury.

Campbell.—Then perhaps your Lordship would nonsuit the plaintiff.

ABBOTT, C. J.—According to my present view of the case, I think the plaintiff is entitled to a verdict. But I will give you leave to move.

Verdict for the plaintiff.—Damages, 50*l.*

Marryat, and *F. Kelly*, for the plaintiff.

Campbell, for the defendant.

[Attornies—Overton & C., and Hammond.]

(a) That case decides, that a landlord has no right to distrain, unless there be an *actual* demise to the tenant at a *fixed* rent; and, therefore, where a tenant was in possession, under a memorandum of agreement to let on lease, with a purchasing clause, for twenty-one years, at the nett clear rent of 63*l.*,

the tenant to enter any time on or before a particular day:—it was held, that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain.

1826.
 SAUNDERS
 v.
 MUSGRAVE.

On the first day of the ensuing Michaelmas Term, *Campbell* moved in pursuance of the leave given at the trial, and the Court granted a

Rule to shew cause.

Oct. 10th.

EVANS v. CURTIS and Another.

In *assumpsit* on a written agreement, where the attesting witness to the execution was not produced at the trial: it was held sufficient, in order to let in evidence of his hand-writing, to prove by a person who knew him, but had not seen him for 18 months, that at the request of the plaintiff's attorney, he had made inquiry for him at coffee-houses and other places, where he thought he might hear of him, but without success; and that it was not necessary to shew that inquiry had been made of both the parties who had executed the agreement.

THE declaration stated, that before and at the time, &c. one Henry Ibbettson was the superior landlord of a certain messuage, &c. and the said defendants were tenants of a certain part thereof; and, thereupon, in consideration that the said plaintiff had become tenant to the said defendants of a certain part of the said messuage, &c. at the yearly rent of 30*l.*, they, the said defendants, undertook, &c. to indemnify and save harmless him, the said plaintiff, from and against the payment of any rent payable to the said Henry Ibbettson, as such superior landlord as aforesaid. The declaration then went on to allege, that the defendants neglected to indemnify the plaintiff according to their promise, in consequence of which a distress was put into the premises by Ibbettson for a sum of 55*l.*, under which the plaintiff's goods were sold, and he was greatly injured in his business. There were the usual money counts, and the plea was—*Non assumpsit*.

The agreement between the parties was as follows:—
 “Memorandum of agreement, made 24th day of June, 1825, between Henry Curtis and Co., of Uxbridge, on the one part, and William Evans, of Fleet Street, Fishmonger,

An agreement for letting premises (under hand only), was signed “H. Curtis and Co.; and it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose hand-writing it was signed:—Held, upon evidence, that both persons acted in the business, that there was sufficient proof of an execution by the partnership.

If an agreement for letting part of a house, at a rent of 30*l.*, contain a clause, that the tenant shall be liable only to the said rent, such clause is a clause of indemnity, and an action will lie upon it, if the tenant's goods are seized under a distress for rent by the original landlord, though the party giving the indemnity be not the immediate tenant of such original landlord. But if no notice be given to the party indemnifying, that he may pay the rent and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts.

of the other part. The said Henry Curtis agrees to let unto the said William Evans, his under-tenant, and assigns all the back part of the ground-floor of dwelling-house, situate No. 1, Lawrence Lane, Cheapside, London, to hold the same from Midsummer-day last past, from year to year, during the time of the said Henry Curtis and Co.'s holding of it, and under the clear yearly rent of 30*l.*, payable half yearly to the said Henry Curtis and Co. *It being the express intention of the parties herunto, that the said William Evans shall be liable only to the said rent of 30*l.** And further, that the said William Evans agrees to take the premises, &c. &c.

1826.
 EVANS
 v.
 CURTIS.

Witness (Signed) *H. Curtis and Co.*
John Lowe. *Wm. Evans."*

The subscribing witness, John Lowe, was not produced; but a person was called, who proved that he had not seen him since eighteen months before, at which time he kept the Echo Office for servants, in Lawrence Lane, London, which office had been shut for a twelvemonth; that, at the request of the plaintiff's attorney, he had made every search for Lowe at different coffee-houses, and other places, but he could not find him.—It was then proposed to prove Lowe's hand-writing.

Comyn, for the defendants, objected. Enough has not been done to let in parol evidence. Inquiry should have been made of the parties to the agreement.

ABBOTT, C. J., thought that the evidence should be received.

A servant of the plaintiff's proved that the defendants (who were Curtis and Baker) were in partnership, under the firm of H. Curtis and Co., and that he had seen them both frequently on the premises.

The father of Ibbettson granted a lease of the premises

1826.
EVANS
v.
CURTIS.

to a person named Fisher, who assigned to one Kennett, who granted an under-lease to Gibbons, who assigned the under-lease to Embden, who let the premises in parts to the defendants and others. The plaintiff's goods had been sold under a distress, for 55*l.* due to Ibbettson.

Comyn, for the defendants.—The plaintiff must be called. There is no evidence of the execution of the agreement by Thomas Baker, one of the defendants.


ABBOTT, C. J.—The signature may be Baker's for aught I can tell. I think there is enough to shew that both defendants are parties to the agreement. There is evidence of their acting together, which shews a partnership, and one partner may bind another except by deed.

Comyn.—I submit that there is not evidence of a partnership: but if there be a lease, it is not that sort of document which a partner is authorised to execute for a firm. The interests of two partners may be distinct as to the right in the premises. I submit, also, that the action is not maintainable against the defendants. There are no words on the face of the instrument which at all touch the question of indemnity against any title. The plaintiff has declared specially on an indemnity against Ibbettson. Now the relation of landlord and tenant, as between Ibbettson and the defendants, does not exist. They must shew that the party against whom the action is brought is the party liable to pay the rent.

ABBOTT, C. J.—They must shew that *the premises* were subject to the payment.

Comyn.—It is the fault of Fisher's representatives, the defendants were not liable to pay, therefore they are not liable in this action. There is no evidence that the premises belonged to the partnership.

ABBOTT, C. J.—Supposing the hand-writing of the attesting witness to be proper evidence of the hand-writing of the party, there is abundant evidence of an execution by the partnership. Both partners act in the matter, and that is a ratification. The written agreement is not quite so bare as is supposed, for it contains this clause: “It being the express intention of the parties present, that the said William Evans shall be liable only to the said rent of 30*l*.” The question is, Whether that is not in effect an engagement to indemnify against any other rent? I think it is. But it does not appear that any notice was given to the defendants that they might pay the rent. Therefore, I think, the plaintiff cannot recover on the special count.

1826.

 EVANS
 v.
 CURTIS

The plaintiff had a verdict on the common counts for a sum of 40*l*., being the remainder of the amount distrained for, after deducting a sum of 15*l*. due from him to the defendants for rent, which it was agreed should be settled in this way.

Campbell and Platt, for the plaintiff.

Comyn, for the defendants.

[Attornies—*T. Miller*, and *Allen & Co.*]

1826.

Oct. 11th.

If a letter, giving notice of the dishonour of a bill, contain this passage—"I did not know till within *these few days*, where you were to be found"—such passage is not to be taken as proving that the notice was not given on the next day after the residence of the party was discovered.

KERBY v. ENGLAND.

ASSUMPSIT on a bill of exchange, by the indorsee against the drawer.

Notice of dishonour had not been given for several months; and, to account for this delay, one of the indorsers of the bill proved, that as soon as he could find the party who paid the bill to him, he inquired for the defendant, and was told that he kept a public-house in the neighbourhood of Hackney, Homerton, or Clapton, and that he ~~then~~ inquired for him at those places, but was not able to find him sooner. The letter which contained the notice had this passage in it:—"I did not know, till within "*these few days*, where you were to be found."

Chitty, for the defendant, submitted, that due diligence had not been used in giving him notice. The letter was an admission that his address had been known for *several days* before; and a notice ought to be given on the very next day after a party is discovered.

ABBOTT, C. J.—For aught I can tell, "within these "*few days*" may mean the previous day: I cannot say that it does not.

Chitty.—If I prove that the defendant has lived in the same house for several years, does your Lordship think that fact will vary the case?

ABBOTT, C. J.—I think not. Every body is not bound to know every publican in a place.

Verdict for the plaintiff.

Denman, C. S., and *Abraham*, for the plaintiff.

Chitty, for the defendant.

[Attornies—*F. Hill*, and *In Person*.]

1826.

GUTHRIE and Others, Assignees of DEVEREUX, a Bankrupt,
v. CROSSLEY.

Oct. 12th.

ASSUMPSIT for money had and received. The commission was dated the 27th of January, 1826, and the assignment the 28th of February.

The bankrupt's clerk proved, that the bankrupt stopped payment on the 5th of January: that on the evening of the 6th, he directed him to carry a 200*l.* Bank of England note, which he took from his cash-box, to the defendant Crossley. The witness was then asked what he said to the bankrupt upon receiving the note.

Gurney, for the defendant, objected to the receiving evidence of statements made in the defendant's absence.

ABBOTT, C. J., thought the question a proper one, as the inquiry was into the bankrupt's motives, for which purpose it might be important to hear the answers which he gave to the witness.

The witness then stated, that he asked the bankrupt why he was to take the money to Crossley. The bankrupt answered, to help him over his payments. The witness said, "You may do as you please, sir; but, if I were you, I would do no such thing: I would not commit myself with any party, but would take care of what there is, and not make the effects liable in any way." The bankrupt said, "I don't know what to do: I promised to send him 200*l.*" The witness said, "At all events, send him only 100*l.*; it is as well to risk but half of it." The bankrupt said, "Well, do as you please." The witness accordingly took 100*l.* to the defendant, and received two post-dated cheques for the amount.

It appeared from the cross-examination of the witness, that a bill was becoming due the next day, which the de-

A trader stopped payment generally on the 5th of January; and on the evening of the 6th, sent a 100*l.* note to a particular creditor, saying it was to help him over his payments. Held, that such trader afterwards becoming bankrupt, his assignees might recover the money in *assumpsit*, although it appeared that, at the time of payment, a bill for a larger amount was becoming due, which had been accepted by the creditor for the bankrupt's accommodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because, he being a party to it, the payment operated *pro tanto* in his discharge.

1826.

GUTHRIE
v.
CROSSLEY.

defendant had accepted for the bankrupt's accommodation, for 179*l.*, and for which the bankrupt was to provide; and it seemed from the balance-sheet, that on the whole account between the parties, the bankrupt was indebted to the defendant in a sum of 148*l.*

Marryat, for the plaintiff, relied on the case of *Poland*, assignee of *Melnescheg*, a bankrupt, v. *Glyn* (a).

ABBOTT, C. J., inquired of Mr. *Gurney* if he could distinguish that case from the present?

Gurney submitted, that the defendant in this case was the agent of the bankrupt to make the payment for the bill.

ABBOTT, C. J.—I cannot consider it in that light. If the defendant had not been a party, but the bill had been merely made payable at his house, then, like any servant, he might receive the money with one hand, and pay it over with the other; but as he is a party to the bill, it is for his discharge *pro tanto*. I cannot myself distinguish this case from that of *Poland* v. *Glyn*, but I will give you leave to move the Court for a nonsuit.

Verdict for the plaintiffs.

Marryat, and *E. Lawes*, for the plaintiffs.

Gurney, for the defendant.

[Attorneys—*Downs & G.*, and *Walker & Co.*]

(a) 2 Dow. & Ry. 310. In that case it was held, that if a person in trade pays a sum of money to one of his creditors, and his affairs are in such a state that he may reasonably believe bankruptcy probable, but not inevitable, at the time he makes such payment, it is fraudu-

lent within the meaning of the bankrupt laws; and if bankruptcy afterwards ensues, the assignees may maintain *composit* for money had and received to their use, against the person to whom such voluntary payment has been made.

FAYLE v. BIRD.

1836.

Oct. 12th.

ASSUMPSIT on a bill of exchange. Drawer against acceptor. The bill was *drawn* payable to order in *London*. The cause was not defended.

Semble, that in *assumpsit* on a bill of exchange against the acceptor, where the bill is drawn payable to order in London, it is necessary to prove presentment at some place in London.

ABBOTT, C. J., thought it necessary for the plaintiff to prove presentment at some place in London, which not being in a situation to do, he was

Nonsuited.

But leave was given for a motion to the Court to enter a verdict for the plaintiff.

Hutchinson, for the plaintiff.

[Attornies—*Smith & W.*, and *Robinson & B.*]

In the ensuing Michaelmas Term, *Hutchinson* moved pursuant to the leave given, and cited *Selby v. Eden* (a).

The Court, on the authority of that case, granted a Rule to shew cause.

(a) This case decides, that where a bill is accepted payable in London, presentment of it there need not be averred in the declaration.—
11 J. B. Moore.

MANVELL v. THOMSON.

Oct. 13th.

TRESPASS for seducing the plaintiff's niece and servant.

The plaintiff was a ticket-porter, and his niece, the subject of the action, was a girl of about sixteen years of age, whose parents had been dead some years. A sum of nearly 500*l.* a-piece was left by her parents to herself

In trespass for seducing the plaintiff's niece and servant, *per quod servitium amisit*; evidence that the party seduced (being about 16 years

of age) occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece; and such relation is not destroyed by the circumstance of the niece's being entitled, on her coming of age, to a sum of nearly 500*l.*, of which the interest is applied in the mean time for her benefit.

Proof in such case, that the niece, after her seduction and abandonment by the defendant, returned to her uncle's house, where she continued some time in a state of great agitation, and received medical attendance, and was obliged to be watched, lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle, which is necessary to maintain the action.

1826.
 MANVELL
 v.
 THOMSON.

and her brothers and sisters, which was deposited in the Bank till they should come of age. She was brought up at her uncle's, and was for some time out at service, but returned to her uncle's house previously to the time when she was debauched by the defendant. It appeared that while she was at her uncle's, who had several children, she assisted them in the domestic business of the house, as they kept no regular servant.

Denman, for the defendant.—The action is not maintainable: the evidence of service is too slight. The presumption of her being a servant to her uncle is rebutted by the fact of her having so large a sum of money; and the relation of uncle and niece is not of itself sufficient.

ABBOTT, C. J.—Certainly the relation of uncle and niece of itself will not do: but I think there is enough in the evidence to constitute the relation of master and servant. Suppose a son has money enough to find himself in clothes, the relation of father and son is not destroyed by that circumstance. In this case, the uncle is *in loco parentis*. The smallest degree of service will do. It seems there was no servant kept; and it is reasonable to conclude, that all the members of the family assisted in turn in the performance of the household work.

The cousin of the girl, and a surgeon, proved, that when she returned to her uncle's house, after she had been seduced and abandoned by the defendant, she was in a state of very great agitation, and continued so for some time: that she received medical attendance, and was obliged to be watched, lest she should do herself some injury. This was taken as evidence raising the presumption of loss of service by the uncle; and he had a

Verdict—Damages 400*l*.

The general evidence in cases of this description, to prove loss of service, is the fact of the birth of a child, and the sickness and con-

J. Williams and Law, for the plaintiff.

Denman, C. S., for the defendant.

[Attornies—*J. Platt*, and *Michell*.]

1826.

MANVELL

v.

THOMSON.

finement which are attendant upon the above was the only evidence it : but, in the present case, the given to support that part of the party had no child ; and therefore case.

FAWCETT, Gent. One, &c. v. WRATHALL.

Oct. 13th.

ASSUMPSIT on an attorney's bill.—The charges were partly for preparing briefs for counsel to attend before the commissioners on the behalf of the defendant, and a person who was in partnership with him when they had become bankrupts.

In *assumpsit* on an attorney's bill, where the charges are for business done for two persons, partners; if one only is sued, and there is no plea in abatement, the other may be called as a witness for the plaintiff.

This partner was called as a witness for the plaintiff.

Marryat, for the defendant, objected to his testimony, on the ground of interest.

F. Pollock, for the plaintiff, stated, that, in a case from the Northern Circuit, the Court of King's Bench, a few Terms previously, had decided, that if a contract is joint, and only one is sued, if there be no plea in abatement, the party who is not sued is a competent witness even to prove the defendant's liability.

ABBOTT, C. J., disallowed the objection.

It appeared that separate bills had been delivered to the defendant and the witness, and that the witness had paid his.

Verdict for the plaintiff.

F. Pollock, for the plaintiff.

Marryat, for the defendant.

[Attornies—*Fawcett*, and *Chester*, Junr.]

1826.

Oct. 16th.

MYERS v. TAYLOR, Gent. One, &c.

A plea "*puis darrein continuance*" may be received at Nisi Prius on paper, and need not be transcribed upon parchment.

CHITTY, for the defendant, tendered a plea *puis darrein continuance*. It was on paper.

Platt, for the plaintiff, submitted, that it ought to be put upon parchment:—it is to form part of the record.

ABBOTT, C. J., observed, that he had inquired of **Mr. Bellamy**, who said that it was usual on circuit to put such a plea upon parchment.

Scarlett, as *amicus curiæ*, remarked, that the plea at Nisi Prius is pleaded *ore tenus*, and is afterwards transcribed by the clerk of Nisi Prius on the record, and it is a mere matter of form whether it is on parchment or not.

Chitty mentioned that his Lordship had decided in a similar case before, that the plea need not be transcribed on parchment.

ABBOTT, C. J.—**Mr. Chitty** has referred me to a former decision of my own; I shall act in unison with that decision, and receive the plea upon paper.

The plea was received, and the cause, of course, could not be tried.

Platt, for the plaintiff.

Chitty, for the defendant.

[Attornies *Scargill & R.*, and *Cottle*.]

1826.

Adjourned Sitings in London, after Trinity Term, 1826.

BOURKE v. WARREN and Others.

Oct. 20th.

THIS was an action for a libel published in the Courier newspaper, accusing the plaintiff of being the writer of a fabricated letter, signed "Jo. Evans."

The declaration stated, that the plaintiff before, &c. was accustomed to attend at a certain police-office, commonly called the Marlborough Street police-office, to collect information, and was commonly known by the description of the Times reporter; and that Charles Burton Lane appeared there, and made information on oath, that a person had committed an indecent assault on him. That one John Grosset Muirhead was apprehended, and was committed on that charge; and that Robert Spilsbury, to whom Lane was an apprentice, was bound by recognizance for the appearance of Lane to give evidence against Muirhead; and that before the publishing, &c. of the scandalous, &c. libel hereinafter next mentioned, on, &c. at, &c. a certain letter was addressed, written, and sent to the said Robert Spilsbury, which said letter contained *the words and matter* following, of and concerning the said John Grosset Muirhead, and of and concerning the said charge, and of and concerning the said Charles Burton Lane, and of and concerning the said Robert Spilsbury, and of and concerning the said recognizance. (The letter was here set out verbatim with innuendoes. It contained a request that Mr. Spilsbury would get Lane out of the way, and a promise of indemnity, and a present of 500*l.*, and so far the letter was set out exactly as it really was; but in the declaration it went on:) As there is nothing unworthy a perfectly honest man in what I (meaning the writer of the said letter), propose, and which you (meaning the said Robert Spilsbury), may *with perfect pro-*

If, in a libel, asterisks be put instead of the name of the party libelled, to make it actionable, it is sufficient that the party should be so designated, that those who know the plaintiff, may understand that he is the person meant; and it is not necessary that all the world should understand it. But if witnesses, who state that they understand that the plaintiff is the person, also say that they were enabled so to understand by the perusal of another libel, with which the defendant had no concern, their evidence ought to be laid out of the case.

If a letter, set out as inducement, be alleged to contain "the words and matter following;" and when the letter is read in evidence, it is found to contain all that is stated in the declaration, and something more, this is no variance.

1826.

BOURKE

v.

WARREN.

priety accede to, I (meaning the writer of the said letter), shall expect a written answer." (It then set out the letter, which was signed Jo. Evans, to the end). The declaration then stated, as inducement, a paragraph in the Courier newspaper, in which it was stated that the letter had been written by a person who had been sued, and also a letter written to the magistrates at the Marlborough Street police-office, by a person named Edmonds, (which letter was a copy of the libel, except that the part of it, in which were five asterisks in the libel, was supplied with the words "Times reporter" in this letter, and then the libel itself was set out. The libel itself professed to be a copy of the letter of Edmonds. That letter, as stated in the libel, asked the magistrates to declare that Edmonds was not the author of the fabricated letter, (signed Jo. Evans); and the libel went on to say, that if the magistrates would not, "the only alternative I (meaning the said Edward Edmonds), now have, is to state that the ***** (meaning the said plaintiff) (a), is the person accused by Mr. H. of fabricating the letter sent to Mr. Spilsbury." Plea—General issue.

When, as a part of the proof of the introductory averments, the letter, signed Jo. Evans, was put in, it was verbatim the same as stated in the declaration, except that one paragraph of it was as follows:—"As there is nothing unworthy a perfectly honest man in what I propose, and which you may with perfect propriety *and safety* accede to, I shall expect a written answer."

Scarlett and *F. Pollock*, for the defendants, objected that this was a variance; the word *safety* conveying a different sense from the word *propriety*; the one, in this case, meaning the absence of legal guilt, the other moral correctness; and, from the context, those words evidently bore different meanings.

(a) This was the only passage in the libel which could by any possibility apply to the plaintiff.

Gurney and Platt, contra.—This letter is not the libel complained of, and we do not profess to set out the exact words; we only say, that the letter contained “the words and matter” that we have set forth; and it does so: and though it may contain two words more, we have proved all that we have alleged.

1826.
 }
 BOURKE
 v.
 WARREN.

ABBOTT, C. J.—This is not a variance. This letter is mere inducement, and not the libel itself. This letter, no doubt, must be set out with a certain degree of correctness, but it need not be in the exact words; all that is or need be alleged, is the substance, or so much of it as is necessary, which is here proved as laid.

In the libel the party libelled was designated by five asterisks. To prove that the plaintiff was the person meant, Mr. Roe, the magistrate, and Plank, an officer of the Marlborough Street police-office, proved that they understood it to mean the plaintiff; but they both stated that they did not derive their knowledge entirely from the perusal of the libel itself, but partly from the letter of Edmonds, which had been sent to Mr. Roe, in which the words “Times reporter” were introduced instead of the five asterisks.

Another witness proved, that he considered the plaintiff was the person meant, because, in the first Courier newspaper, which was mentioned in the declaration, the writer of the letter to Mr. Spilsbury was asserted to be a person who had been sued by Mr. H.

On this evidence, the defendants’ counsel went to the Jury, on the ground that it was not sufficiently shewn that the plaintiff was the person meant by the libel.

ABBOTT, C. J., (in summing up to the Jury).—The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those

1826.
 BOURKE
 v.
 WARREN.

who knew him understand that he was the person meant? It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant. With regard to the evidence of Mr. Roe, and of Plank, I think you ought to lay that out of the case, because they had seen the written letter of Edmonds, (with which the defendants had nothing to do), and, therefore, they partly derive their information from that. In the prior newspaper some allusion was made to a person who had been sued, and that was what guided the last witness. You must, therefore, consider, whether the two newspapers shewed to those who knew the plaintiff, that he was the person meant.

Verdict for the defendants.

Gurney and Platt, for the plaintiff.

Scarlett and F. Pollock, for the defendants.

[Attornies—*G. Gill*, and *T. & S. Pearce*.]

In *Hart's* case, Trin. 12 Ann. (1 Curw. Hawk. 543), it was resolved, that a defamatory writing, expressing only one or two letters of a name, in such a manner that, from what goes before and fol-

lows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, is as properly a libel as if it had expressed the whole name at large.

Oct. 21st.

A notice of set-off can only be given with the plea of the general issue. If there be any other plea besides the general issue, the set-off must be pleaded.

WEBBER v. VENN.

ASSUMPSIT. The declaration stated, that the defendant was employed as clerk to the plaintiff, and that he undertook to obey the directions of the plaintiff, and that he was directed to accept bills to the amount of 2400*l.* only: but that, not regarding, &c. he accepted bills to a greater amount. There were also the common money counts. Pleas—The general issue; the statute of limitations; with a notice of set-off.

ABBOTT, C. J.—I observe that there are the general issue, and a plea of the statute of limitations, with *a notice* of set-off. This is wrong: I think it proper to mention it, as this is a mistake sometimes made. A *notice* of set-off cannot be given with any other plea but the general issue. In all other cases, a set-off must be pleaded.

1826.
WEBBER
v.
VENN.

Verdict for the plaintiff—Damages 5000*l.* by consent.

Scarlett and *F. Pollock*, for the plaintiff.

Gurney, for the defendant.

[Attornies—*Peachy*, and *Orlebar*.]

PARKIN v. FRY.

Oct. 24th.

ASSUMPSIT. The declaration stated, that in consideration that the plaintiff would permit the defendant and others to use an invention for which he had obtained a patent, the defendant promised to pay, &c. There was also a count for work, labour, and journies performed, and the common money counts. Plea—General issue.

It appeared that the plaintiff had invented a mode of laying pieces of granite of the width of nine inches, end to end, so as to form a substitute for iron rail-roads, at a much less expense; and that for this invention the plaintiff had obtained a patent, and that prospectuses (which mentioned the patent) had been issued, for forming a joint stock company, to be called The National Stone-way Company. It was proved by a clerk of the solicitor to the company, that a committee was appointed, and that the plaintiff acted as secretary. It was admitted that money was advanced for the intended company, and that a balance was in the hands of the defendant, who was a banker, and that the plaintiff acted as the secretary at the meetings of

If a person who is the inventor of a scheme get gentlemen to act as a committee, with intention of forming a joint-stock company to carry it into effect, and he himself act as secretary to the committee, he cannot maintain an action against one of the committee for his services as such secretary, or for his trouble, or for journies he undertakes in furtherance of the execution of the scheme.

1826.
 PARKIN
 v.
 FRY.

the committee, and took several journies on the business of the intended company (of which his actual expenses had been paid out of the company's funds); and evidence was also given of the value of his services. However, the only evidence to connect the defendant with the case as having acted in the affairs of the company, was the following resolution of the committee of the intended National Stoneway Company:

“ June 6th, 1825.—Resolved, that William Fry, Esq. be “ added to the committee;”

And also the fact of his attending a meeting of the committee on the 23d of June, 1825, at which the plaintiff acted as secretary, and at which the defendant moved a resolution which appeared in the minutes of the meeting as follows:

“ Adjourned *sine die*, the secretary being instructed to “ summon the committee as soon as necessary.”

F. Pollock, for the defendant.—It is true that Mr. Fry has a small sum of money in his hands; but that he holds for the subscribers to the company, to whom he must pay it when they call it out of his hands. But my answer to this action is this:—The whole scheme was the plaintiff's, he being the inventor of the plan. The committee met on his suggestion, to carry his plan into effect: he has no more right to bring an action against Mr. Fry for his acting as secretary, than Mr. Fry has to bring an action against him for acting as one of his committee; and I submit to his Lordship, that if the company originated with the plaintiff, he must look to the scheme for his reward; and instead of the company calling on the plaintiff to assist them, he collected the company together.

ABBOTT, C. J.—Where is the proof that the plaintiff was employed by the defendant?

Scarlett.—The plaintiff is recognised by the committee as the secretary; and in the very resolution moved by the defendant, is a direction to the secretary to do an act.

1826.
PARKIN
v.
FRY.

ABBOTT, C. J.—Will it be more than this—that the plaintiff has obtained a patent, and assembles gentlemen to sanction it, for a company could not go on without a higher sanction; and when it is determined that journies shall be made, they pay his expenses: indeed, I was forcibly struck by Mr. *Pollock's* argument, that they might just as well charge him for their attendance.

Scarlett.—But, my Lord, the company still exists, and is not dissolved.

ABBOTT, C. J.—I consider it as never yet formed. If the gentlemen had sent for the plaintiff to assist them, it would have been different; but he is plainly the first mover and instigator of it, and I cannot say that there is any evidence that the plaintiff was employed by Mr. Fry.

Nonsuit.

Scarlett, and *Chitty*, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—*Baker*, and *Young & Vallings*.]

IN the ensuing Michaelmas Term, *Chitty* moved the Court to set aside the nonsuit; but the Court refused the Rule.

1826.

Oct. 25th.

SNOW and Another v. LEATHAM and Others.

In an action of trover to recover bank-notes belonging to the plaintiffs, which the defendants had taken without using due caution, if it appears that the plaintiffs' porter had different securities for money to get turned into bank-notes and cash, and that he came back with the odd cash, but alleged that the notes, which were the remaining proceeds of the securities, were stolen,—it will be for the Jury to say, whether the securities were stolen from him before they were cashed, or whether the bank-notes were stolen afterwards, and when they were the property of the plaintiffs in his hands. If the latter, it is not material whether the porter purloined the bank-notes himself, or was robbed of them by thieves.

TROVER for three bank-notes of 200*l.*, 100*l.*, and 50*l.* From the evidence on the part of the plaintiffs, it appeared that they were bankers in London, and that, on the evening of the 7th September, 1824, they collected their securities for money, and gave those payable east of Temple-Bar to a confidential porter, since deceased, to obtain payment of them next day. Among them was a dividend warrant for 1379*l.* 5*s.* 0*d.*; a cheque on Messrs. Glyn & Co. for 294*l.* 7*s.* 9*d.*; and a cheque on Messrs. Remingtons for 50*l.* 14*s.* 8*d.* On the morning of the 8th, it appeared that the porter came in with his coat pocket cut, and in great agitation, and said he had been robbed of all the *notes* he received for these three securities and others. The odd sovereigns and silver he brought with him. It was proved that the 100*l.* note was one of the notes paid on the dividend warrant, the 200*l.* note at Messrs. Glyn's, and the 50*l.* note at Messrs. Remington's; but neither of the clerks could recollect whether they respectively paid these notes to the porter of the plaintiffs or to any other person. On the 8th of September, hand-bills were printed, stating the numbers, dates, and amounts of these notes (and of others stolen with them); but in these bills the 200*l.* note was described as of the date of the 9th of August, 1824, whereas in fact its date was the 19th of August, 1824. On the eve of the Doncaster races in that year, which are in the month of September, it being expected that the notes would be at-

If the defendants received notice of the loss, that notice is not to be considered in point of law as operating as a notice for all time; and unless such notice be renewed, it will be for the Jury to say, whether, if the defendants heard no more of the matter for a year or more, they might not fairly conclude that the notes had been got back?

A mistake of the date of one of the notes in such a notice (the number and amount being correctly stated), will not avail the defendants, unless they were misled by it. And it is no answer to an action of this kind, that the defendants were always in the habit of changing notes for strangers without asking the names, &c. of those who brought them, nor even that other country bankers did so,—provided the Jury are satisfied that the defendants took these notes under such circumstances as would awaken suspicion in the mind of a reasonable man acquainted with business.

tempted to be passed there, Taunton, a Bow-street officer, called at the defendants' bank at Doncaster, and gave them one of the hand-bills; and it also appeared that one of the plaintiffs wrote a letter to the defendants on the subject in the course of that month: and it was proved, by the evidence of Mr. Henson, the plaintiffs' attorney, who traced the notes, that he called on the defendants on the 25th of October, 1825, when they stated that they received the notes in question, and had given their own notes in change for them, during the Doncaster race-week of 1825; and that, it being the race-week, they did not know of whom they had received them, nor did they ask the person his name.

1826.
 SNOW
 v.
 LEATHAM

On this evidence it was contended, that the defendants had not only evinced a want of due caution in the manner in which they had taken the notes, but that, once having had distinct notice that they were the plaintiffs' property, the defendants must be considered as taking them with a knowledge of whose they were.

The *Solicitor-General* contended, that the plaintiffs ought to be nonsuited. There was no evidence that these bank-notes ever were the property of the plaintiffs; because, if the dividend warrant and cheques were lost by the porter, and taken by others to the places where they were payable, these notes never belonged to the plaintiffs.

ABBOTT, C. J.—I must leave it to the Jury to say, whether the porter was robbed before or after the securities were satisfied. There is the strong fact of his bringing back the loose cash on them.

The *Solicitor-General* went to the Jury.—I do not mean to deny, that it is the duty of a person to refuse to change a note, where there is probable ground to suppose that it was unfairly come by. But if it is taken under such circumstances as not to raise a suspicion, the loss

1826.
SNOW
v.
LEATHAM.

must fall on the plaintiffs; and if the plaintiffs themselves were negligent, they cannot recover against another party who has incautiously taken the note. In September, 1824, notice of the loss was given to the defendants; but from the number of notes changed by country bankers, and the quantity of these notices, it can never be incumbent on them to look through their bundle of notices before they give a customer change for a note. If stolen notes are not recovered, it is incumbent on the losers to renew their notices from time to time. Here a notice was sent in 1824, with a view to the Doncaster races in that year. Now, as the notice was not renewed the next year, it led the defendants to believe that the notes had been got back: and further, the plaintiffs' own notice was calculated to mislead, as it gave a wrong date to one of the notes. It would be proved that notes of a large amount were often changed at the larger country banks, and that it was never the practice to ask for the address of the party bringing the note. And if it were, it would be an idle question, for the party would only give a false address, which would mislead the parties, instead of being of any use. Indeed, at the Bank of England, the most ragged man in London would have notes changed to any amount, without any question, if he only wrote his name on the back of them.

For the defendants, it was proved that value was given for these notes by the defendants, and that it was the practice of their and of several other eminent country banks, not to take the address of the persons they changed notes for, nor to make any entry of the numbers, though some of them asked the name of the bringer.

Scarlett, in reply, contended, that the mistake of the date in the notice made no difference, as the defendants were not misled by it; and as to the notice being renewed, notice once given is, in point of law, always notice, and no renewal could be ever required.

1826.

SNOW

v.

LEATHAM.

ABBOTT, C. J. (to the Jury)—The plaintiffs allege that they were deprived of these notes without a change of property, and that the defendants took them in such a manner as not to entitle them to keep them. The law should be such as not to impede the circulation of notes on the one hand, and not to give encouragement to theft and fraud, by allowing too great a facility in disposing of stolen property, on the other. If a person take a Bank of England note, under circumstances which might awaken suspicion in the mind of a reasonable man acquainted with business, and which ought to cause him to make inquiries, and he forbear to do so, he cannot hold the proceeds of such note from the person who has lost it. In this case, you have to consider whether the stealing was after the securities were cashed and turned into money; for, if it was, whether the porter purloined the notes himself, or whether they were stolen from him by thieves, is immaterial. On the approach of the Doncaster races in 1824, notice of the robbery was sent to the defendants, on a supposition that it was likely that the notes would be attempted to be passed there. Now it is contended, as matter of law, that notice once given is notice for all time. I do not go all that way with the learned counsel for the plaintiffs: and I think it is for you to consider whether, as men of business, the defendants would fairly advert to a notice of this kind, given a year before, or whether they might not suppose, as they heard nothing more about the matter, that the notes had been got back. As to the mistake of the date of one of the notes, that I think makes no difference, unless the defendants were misled by it. It is proved for the defendants, that they do not ask who brings the notes, nor enter numbers or dates. But the question for you to consider is, whether the defendants conducted their business in the race-week in such a manner as to hold out temptation to persons unlawfully possessed of property to pass it to them—the defendants knowing that at such a time all sorts of persons, some being of the highest, and some of

1826.
 SNOW
 v.
 LEATHAM.

the most depraved classes, were then at that place. If you think that was so, you ought to find for the plaintiffs; but if you think that there was nothing incorrect in the manner in which the defendants' bank was carried on, and that the defendants took the notes in the regular and proper course of business, you will find a verdict in their favour.

Verdict for the plaintiffs—Damages 350*l*.

ABBOTT, C. J.—I hope that the gentlemen who carry on the business of bankers in the country will be warned by what has taken place, and conduct their business with more care in future.

Scarlett, Brougham, and Platt, for the plaintiffs.

The *Solicitor-General*, *Denman*, and *Parke*, for the defendants.

[Attornies—*Henson & D.*, and *Leaver*.]

See the cases of *Beckwith v. ling*, ante, p. 11, and the cases there cited.
Corrall, ante, p. 261; *Snow v. Peacock*, ante, p. 215; *Downe v. Hat-*

Oct. 25th.

FUSSIL and Others, Executors of DAWSON, v. BROOKES and Others.

If a bond be given for the repayment of money, with interest at 5*l*. per cent., proof that the obligee has received interest on it at 7½ per cent. will not avoid the bond, unless the jury are satisfied that it was agreed, at or before the execution of the bond, that more than 5*l*. per cent. should be paid.

DEBT on a bond, dated May 8, 1820, in the penal sum of 1200*l*., to secure the repayment of 600*l*. and interest, at 5*l*. per cent., on the 8th of May, 1822. Pleas, 1st, the general issue, and, 2nd, that the loan was usurious, the money being lent at 7½ per cent.

It was proved, that in July, 1823, the defendant went to Dawson (who died in April, 1824), and, having put down 15*l*., which was half a year's interest at 5*l*. per cent., said, "Now, Mr. Dawson, what have I more to pay, to make up the 7½ per cent.?" To this Dawson replied, "I have had things of you to the amount of 2*l*. 10*s*., and if you give me 5*l*. more, that will be the sum;" and that the defendant did so.

Scarlett, in reply, contended, that, as the interest was payable in May, if this further interest was paid for the forbearance till July, though the payment would be usurious, it would not avoid the bond.

1826.
Fussil
v.
Brookes.

ABBOTT, C. J.—To avoid the bond, it is necessary that the usurious interest should have been agreed for at or before the execution of the bond; and if the Jury are satisfied that it was so agreed for at or before the execution of the bond, there is no doubt that the bond is void; but if it was agreed for afterwards, the bond will be good, though that payment was usurious.

Verdict for the plaintiffs.

Scarlett and *Parke*, for the plaintiffs.

Marryat, for the defendants.

[Attornies—*Adlington & Co.*, and *Frowd & R.*]

By the stat. 12 Anne, st. 2, c. 16, it is enacted, "That no person or persons whatsoever, from and after the nine and twentieth day of September, in the year of our Lord, 1714, upon any contract, which shall be made from and after the said nine and twentieth day of September, take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made after the time aforesaid, for payment of any principal, or money to be lent or covenanted to be performed, upon or for any usury, whereupon or whereby there shall be reserved or

taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void; and that all and every person or persons whatsoever, which shall, after the time aforesaid, upon any contract to be made after the said nine and twentieth day of September, take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of five pounds for the forbearing of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter

1826.
 FUSSIL
 v.
 BROOKES.

term, shall forfeit and lose for every such offence the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted."

In the case of *Tate v. Welkings*, 3 T. R. 538, Mr. Justice Buller lays it down, that, to avoid a contract on the ground of usury, it must be shewn that it was usurious at the time it was entered into; for, if the contract were legal at that time, no subsequent event can make it usurious. And in *Nichols v. Lee*, 3 Anst. 940, in debt on bond, the defendant pleaded, that, after the execution of the bond, the plaintiff took and received from the defendant more than lawful interest for the money due.

This plea was held bad on demurrer, *Macdonald*, C. J., saying, that, to avoid a security as usurious, you must shew that the agreement was illegal from its origin.

In the case of *Lord Bernard v. Saul*, 1 Str. 498, it was laid down, that, in actions of assumpsit, the defendant may give usury in evidence under the general issue; but that, where the plaintiff sues on a specialty, it must be pleaded. And in the case of *Hill v. Montague*, 2 M. & S. 377, it was held, that a plea of usury to an action of debt on bond, must particularly set forth the corrupt contract, and the usurious interest: and a plea, not stating these, was held bad on special demurrer.

Oct. 26th. M'GILLIVRAY and Others, Assignees of INGLIS and Another, Bankrupts, v. SIMSON.

An agreement by a broker, that he will sell goods for his principals, and pay over the proceeds, without setting off a debt due from the principals to him, is not binding.

But if he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, the principals having assumed the funds of that firm; the letter

and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods.

ASSUMPSIT. The declaration, which contained several special counts, stated, that the bankrupts, together with another partner, since deceased, carried on business with one Edward Ellice, under the firm of Inglis, Ellice, & Co., and that Ellice retired from the said partnership on the 30th of April, 1821, and that the bankrupts and the now deceased partner commenced business under the firm of Inglis & Co.; that a sum of 1844*l.* 7*s.* 5*d.* was due to the defendant from the firm of Inglis, Ellice, & Co., and a further sum of 418*l.* 4*s.* 2*d.* from the firm of Inglis & Co.; and that the firm of Inglis & Co., since the death of the deceased partner, was possessed of four bills of lading, whereby a great quantity of timber was deliverable to them; and that, at the time of the making of the promise, the firm

of Inglis & Co. was insolvent, of which the defendant had notice; and that, in consideration that Inglis & Co. would employ the defendant as broker to dispose of the timber, for a certain commission, and would indorse and deliver the bills of lading to him, the defendant undertook to account for and pay over the proceeds of the sale, *without deducting therefrom the sums of money, or either of them, so due to him as aforesaid.* The plaintiffs then averred performance, on the part of the bankrupts, before their bankruptcy, and that the timber sold for 9000*l.* besides the expenses and charges of the sale; but that “the defendant, not regarding, &c. did not, nor would account for and pay over the proceeds without deducting the two sums due to him as aforesaid; but, on the contrary, rendered an account, in which he deducted the whole of the said two sums; and hath refused to render any other account.” Plea—General issue.

That the plaintiffs were the assignees of Inglis & Co. was admitted. And it appeared by the evidence of Mr. James Inglis, that the partnership of the house of Inglis, Ellice, & Co. was dissolved on the 30th of April, 1821, that firm then owing between 1800*l.* and 1900*l.* to the defendant; and that the firm of Inglis & Co., after the retirement of Mr. Ellice (who is still alive), was indebted to the defendant in about 400*l.* On the death of the witness's father, on the 7th of August, 1822, it was found that the house was insolvent, and the witness called the creditors together (and among them the defendant), and informed them of it. In the months of October and November, 1822, the bills of lading in question arrived: they were of timber, the property of the house. The defendant, who had long been the broker of the house, was asked to act as broker in the sale of them, and was told that he must not set off the debt due from either of the firms against the proceeds, but must render an account of the *whole* proceeds, and pay them over. To this the defendant assented. However, on his cross-examination, the witness stated that it was then in-

1826.
M'GILLI-
VRAY
v.
SIMSON.

1826.
 M'GILLI-
 VRAY
 v.
 SIMSON.

tended that there should not be a bankruptcy, but that the business should be carried on by the partners, under the inspection of trustees; and this was done from August, 1822, to May, 1823; but on the 29th of May, 1823, a commission of bankrupt was sued out. The defendant delivered an account in the following form:—

Dⁿ. *Inglis, Ellice & Co.* in acc^t. with *Alexr. Simson*, C^r.

To brokerage and				
measuring on ma-				
hogany . £1844	7	5		£0 0 0

Dⁿ. *Inglis & Co.* in acc^t. with *Alexr. Simson*, C^r.

(Here followed a number of items, including the whole of the debt of the firm of Inglis & Co.; and the whole of these, together with the sum of 1844 <i>l.</i> 7 <i>s.</i> 5 <i>d.</i> , above stated, were added together as a total.)		(On this side of the account the defendant gave credit for the proceeds of the timber, and also for some other items.)
---	--	--

The effect of this account being to set off the debts of both firms against the proceeds of this timber. This was the case for the plaintiffs.

ABBOTT, C. J.—It strikes me, that, Mr. Ellice being still alive, the debt due from the firm of Inglis, Ellice, and Co. cannot possibly be set off. But it also appears to me, that the promise not to set off the new account is not binding. The bankruptcy has, clearly, nothing to do with it.

Scarlett, for the defendant.—I submit, that Mr. Simson is justified in what he has done. He made the promise to render the entire proceeds, when it was understood on all hands, that there was to be no bankruptcy; and that promise being made under a different set of circumstances, the assignees can only recover on the bankrupt laws, which

allow of the setting off of debts due from the bankrupts. It is said, as to the account due from Inglis, Ellice, & Co., that that is a debt due from three, which cannot be set off against a debt due to two. However, I shall shew that the bankrupts wrote the defendant a letter, in these terms:—

1826.
M'GILLI-
VRAY
v.
SIMSON.

“ *London, 30th April, 1821.*

“ We beg to acquaint you, that Mr. Ellice retires from our firm from the present date. The business of the house will be continued, as heretofore, by the remaining partners, *who assume the funds, and charge themselves with the liquidation of the debts of the partnership.* We remain, respectfully, Sir, your most obedient servants,

“ *Inglis, Ellice, & Co.*

“ *A. Simson, Esq.*”

Now, by this letter, in consideration of taking the funds, they also take the debts on themselves. Suppose there had been no agreement with Mr. Simson, and that, after such a circular, the new firm had put goods into the hands of the broker, could he not have set off the old debt against these goods? The creditor may not be bound by receiving this letter; but they are bound, as the writers of it.—They make themselves the debtors; and I submit, that we may charge both accounts against them.

Campbell.—In the very account delivered, the defendant calls this the debt of Inglis, Ellice, and Co.

Scarlett.—No doubt it was so; but Inglis & Co. having adopted it, he charges it against them.

ABBOTT, C. J.—I am of opinion, that, if the effect of that letter be such as Mr. *Scarlett* states, then the conversation between Mr. Inglis and the defendant must be set against it, and the parties must therefore come to their legal rights; and then the old rule prevails, that the debt

1826.
 M'GILL-
 VRAY
 v.
 SIMSON.

of three cannot be set off against two. The new account due from Inglis & Co., amounting to 418*l.* 4*s.* 2*d.*, you may set off, but not the old one of Inglis, Ellice, & Co.

Verdict for the plaintiffs accordingly.

Gurney and Campbell, for the plaintiffs.

Scarlett, Marryat, and Parke, for the defendant.

[Attornies—*Healey*, and *W. Wright*.]

IN the ensuing Michaelmas Term, *Gurney* moved for a rule *nisi* for a new trial, and contended, that the defendant was not entitled to set off the debt due from either of the firms, because, in consideration of the brokerage of the timber, he agreed not to set off *either* of the debts; and this being a promise founded on a valuable consideration, he must be bound by it. The Court, after adverting to the cases of *Eland v. Karr*, 1 East, 375; *Cornforth v. Rivett*, 2 M. & S. 510; and *Mayer v. Nias*, 8 Moore, 275, and 1 Bing. 311 (a), refused the rule.

(a) In the case of *Eland v. Carr*, the Court held, that, if to a plea of set off, the plaintiff replies, that the goods for which the action is brought, were to be paid for in *ready money*, such replication is bad. In the case of *Fair v. M'Iver*, 16 East, 130, Lord *Ellenborough* appears to doubt the authority of that case. However, in the case of *Cornforth v. Rivett*, the Court held, that, in

assumpsit for goods sold, the defendant might set off an acceptance of the plaintiff's, which had come into his hands after the delivery of the goods, although the defendant had agreed to pay for the goods in ready money. And in the case of *Mayer v. Nias*, the Court of Common Pleas recognized the authority of the case of *Eland v. Carr*.

1826.

LOYD and Others v. FRESHFIELD and KAYE, Gents.
Two, &c.

Oct. 28th.

MONEY lent. Plea—General issue.

The case opened on the part of the plaintiffs was, that they, being bankers, had advanced a sum of 7000*l.* to Mr. Charles Kaye, one of the defendants, on the 23d of August, 1825, and a further sum of 7000*l.* more, on the 26th of the same month. It was opened, that these sums were advanced on the credit of the firm of Freshfield and Kaye (the defendants), who were solicitors to the Bank of England; and also that a great part of it had been applied in discharge of liabilities of that firm, which they must otherwise have made good, if they had not been liquidated by the money advanced by the plaintiffs, and, therefore, that the defendants' firm profited by the advance. To substantiate this, the plaintiffs' counsel stated, that Mr. Charles Kaye went to the plaintiffs' banking-house, and said to one of them that he was instructed to raise money for Mr. Legh, of Cheshire, who was a client of the firm of Freshfield and Kaye, and that a sum of 7000*l.* was wanted for him. This sum was advanced by the plaintiffs, on the 23d of August; but Mr. Kaye was not authorised by Mr. Legh to borrow it, nor did the money ever reach him; the way in which it was disposed of being as follows: A lady, named Fitzgerald, the daughter of Sir James Fitzgerald, had a sum of 20,000*l.*, 3 *per cent.* Reduced, standing in her name, and she had given Messrs. Freshfield and Kaye a joint and several power of attorney to sell it out, if they should think fit. This stock was sold out by Mr. Charles Kaye, and the firm were, therefore, liable to make it good; and it would be shewn that 11,000*l.* of the sum advanced by the plain-

If money be lent to one of two partners, who says he borrows it for the firm, and he misapply it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover against the other partner.

If money be lent to one partner on his individual credit; the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment.

If a witness is called, and refreshes his memory as to the numbers of bank notes, by an entry in a book, the counsel of the opposite party may cross-examine as to the other parts of that entry.

Deeds ought to be attested in the same room in which they are executed,

and not carried away for attestation. The witnesses ought to be careful that they hear the formal words of delivery used; and it is highly expedient that the party executing should state that he fully understands what he is executing. But to make the party designate the instrument in the presence of the witnesses, as by saying "this is my power of attorney," or the like, would be laying down a rule sometimes productive of inconvenience.

The banker of one of the parties in a cause is bound to answer what such party's balance was on a given day, as it is not a privileged communication.

1826.
LOYD
v.
FRESHFIELD.

tiffs was put into the hands of Mr. Easthope, a broker, for the purchasing stock to replace that of Miss Fitzgerald. With regard to 2000*l.* more of the money advanced by the plaintiff, it was opened that Mr. Tate, a gentleman residing in Yorkshire, who was a client of the firm, had borrowed through them a sum of 5000*l.* from the Albion Insurance Office, 2000*l.* of that sum was paid by Mr. Kaye to his credit, at his private banker's, and 1791*l.* of the 2000*l.* of the plaintiffs', was sent by Mr. Kaye to Mr. Tate in discharge of the liability of the firm; and 200*l.* more of it was paid by Mr. Charles Kaye to the bankers of the firm, Messrs. Smith, Payne & Smith; a sum of 7000*l.* had been repaid to the plaintiffs by Mr. Charles Kaye; and for the other 7000*l.* the present action was brought. It was admitted in the opening that Mr. Freshfield was totally ignorant of the whole of the transactions above detailed, and that the way in which it was sought to fix him was, as being at that time the partner of Mr. Kaye.

On the subject of the loan of the money, a clerk of the plaintiffs proved, that Mr. Charles Kaye called at their banking-house, and after a conference with Mr. Lewis Loyd, seven notes of 1000*l.* each were given to him, on his (Mr. C. Kaye's) check; and the clerk stated, that it being usual to put in their books the initials of the person to whom notes were paid, in this instance the initials C. K. were entered. He further stated, that the defendants' *firm* never had an account at the plaintiffs' banking-house. These notes were paid by Mr. Charles Kaye to the credit of his account, at his private banker's, (who was not the banker of the firm).

The evidence as to Miss Fitzgerald's stock amounted to this, that the defendant, Freshfield, and Mr. Kaye, senior, the father of Mr. Charles Kaye, had been attornies to her father; but it did not appear that she was ever a client of the firm of the defendants; and on some inquiries being made, in the year 1825, it appeared that her

stock had been all previously sold out by Mr. Charles Kaye, under a joint and several power of attorney from her to the defendants; she having stated to Mr. Harman, a bank director, that she had signed some paper, but did not know that it gave a power to sell the stock. The stock, however, had been purchased back again into her name, through the agency of Mr. Easthope, who was employed by Mr. Charles Kaye, in his own name, Mr. Kaye using, in a letter he wrote to Mr. Easthope, the words “*I*,” “it will be a great convenience to *me*,” and signing his own name, and not the name of the firm. In the purchase of that stock, a considerable portion of the money advanced by the plaintiffs was applied. The power of attorney which was put in, was a joint and several power to Messrs. Freshfield and Kaye, to sell the whole or any part of the stock. The instructions for it were written by a clerk of that firm in their office, but by the direction of Mr. Charles Kaye only.

1826.
 LOYD
 FRESHFIELD.

Another clerk of Messrs. Freshfield and Kaye proved that he witnessed the execution of the power of attorney by Miss Fitzgerald; he stated, that she was in a drawing-room at the office, which was not ordinarily used for the purposes of business, and which was beyond Mr. Charles Kaye's private room. He further stated, that he was called in to see her sign it, he not knowing what it was; and that after seeing her execute it, he took it into the next room to attest it, but that he heard no explanation given to her as to what it was.

ABBOTT, C. J.—What did Miss Fitzgerald say?

The witness, I don't know that she said any thing except the formal words.

ABBOTT, C. J.—Without meaning to cast any imputation on the witness, I must say, that I think too little attention is paid to this matter; very often deeds are carried

1826.
LOYD
FRESHFIELD.

out of the house to be attested, and in some cases it has been forgotten and omitted. In my judgment, the attestation should in all cases be made in the room where the deed is executed, and witnesses should be careful that the formal words, "I deliver this as my act and deed," are used by the party. I think it also highly expedient that the witness should hear the party say, that he understands what it is that he is doing. Too little attention is paid to this matter, it ought to be treated with much more care than it is.

Scarlett.—It occurs to me, my Lord, that it would be much more advantageous if the party said "this is my power of attorney," or designated the instrument he was executing.

ABBOTT, C. J.—I think that that would be holding the parties too strictly, because there might be cases where binding parties to adhere to such a rule would be highly inconvenient. I have thought it right to say what I have, as it is a matter worthy of the most serious consideration of the profession.

As to the part of the plaintiffs' money which was paid to Mr. Tate, it was proved that, on the 25th of August, Mr. Tate, who lived in Yorkshire, had borrowed 5000*l.* of the Albion Insurance Office. The firm of Freshfield & Kaye were his attorneys, and that sum was in the hands of Mr. Charles Kaye; and that 3000*l.* of that 5000*l.* he sent to Yorkshire, but paid 2000*l.* of it, on the same day, to his own private banker, and sent 1791*l.* of the money advanced by the plaintiffs into Yorkshire instead; and 200*l.* more of the money advanced by the plaintiffs, Mr. Kaye paid into the bank of Smith, Payne & Smith, to the credit of the defendants' firm; and it appeared that Mr. Charles Kaye had not the power of drawing on the funds of the house in the hands of their bankers.

A clerk in the house of Whitmore & Co., who were Mr. Charles Kaye's private bankers, was asked what Mr. Charles Kaye's balance was at a given day.

1826.

LOYD

v.

FRESHFIELD.

The witness applied to the Lord Chief Justice and said, that their orders were not to state what the balance of any customer was, except by the direction of the Judge.

ABBOTT, C. J.—It is not a confidential communication; I think you are bound to answer the question.

Scarlett, for the defendant, Freshfield.—It is clear that the money was not lent to Mr. Charles Kaye on the credit of the firm of Freshfield and Kaye, because it was advanced on the check of Mr. Charles Kaye alone; and as to its being applied to partnership purposes, Miss Fitzgerald was never a client of the firm, and it is not even asserted that Mr. Freshfield was conusant of the transactions relative to her stock, but quite the contrary; and in directing the broker to buy it, Mr. Charles Kaye gives the order on his own sole account. As to Mr. Tate's money, that stands thus: Mr. Kaye had 5000*l.* from the Albion for Mr. Tate, who was a client of the house. Now he keeps two of the thousand pound notes received from the Albion, and sends Mr. Tate one of the notes advanced to him (Charles Kaye) by the plaintiffs, and a part of the proceeds of another of them. That is a mere change of one note for another of equal value, and not an applying of the plaintiffs' money to the purposes of the house.

ABBOTT, C. J.—This case, on the part of the plaintiffs, has been put on two grounds: First, That the money was lent by the plaintiffs to the firm of Freshfield & Kaye. This ground clearly fails, for it is shewn that it was advanced to Mr. Charles Kaye alone, his initials C. K. being put in the plaintiffs' books at the time the notes were given to him. The second ground on which this case is

1836.
 LOYD
 v.
 FRESHFIELD.

put is, that the money was applied to partnership purposes in re-purchasing stock, which both the defendants were liable to make good. On the evidence, it is very doubtful whether Mr. Freshfield could have been called on to make good that stock, but on this I give no opinion. Charles Kaye alone employed the broker to buy it—he gave directions in his own name only—and wrote a letter on the subject in his own name, and signed it “Charles Kaye,” and not Freshfield & Kaye; and he does not profess to say that it is a transaction of the partnership. As to the 2000*l.*, part of which was sent to Mr. Tate, and 200*l.* of the residue paid to the bankers of the firm; it appears that Charles Kaye, as a partner of the house, had received 5000*l.*, and that instead of sending the identical five notes of 1000*l.* each, he takes two of those five, and the next day sends Mr. Tate instead, the proceeds of part of two of the notes advanced to him by the plaintiffs.

Alderson.—My Lord, it appears that, on the 25th of August, he, as a partner of the house, gets 5000*l.* of Mr. Tate’s money; he keeps 2000*l.*, and, on the 26th, he gets the plaintiffs’ money, and repays Mr. Tate out of that.

ABBOTT, C. J.—That is no more than the case of a man borrowing a ten pound note to pay his butcher, and instead of paying the butcher with that individual note, he receives some money of his partners, and pays the butcher with that.

Brougham.—I would put it thus, my Lord: Charles Kaye misapplied Tate’s money on the 25th, and for this the partners were liable; and, therefore, they were benefited by the money of the plaintiffs, as it discharged them from that liability.

ABBOTT, C. J.—Gentlemen of the jury, you have heard

Mr. Brougham's observation; and if you think that there was a loan of money by the plaintiffs to the partners, you will find a verdict for the plaintiffs.

1826.
 LOYD
 v.
 FRESHFIELD.

Verdict for the defendants.

ABBOTT, C. J.—Now the cause is over, I can say, that as soon as it was proved by the plaintiffs' clerk, that the initials C. K. were entered in their book, I considered the cause at an end.

Brougham, Alderson, and Cameron, for the plaintiffs.

Scarlett and Gurney, for the defendant Freshfield.

[Attornies—*Willis & Co.* for the plaintiffs; *Freshfield*, in person; and *Crowder & M.* for the defendant C. Kaye.]

BEFORE ABBOTT, C. J., & BAYLEY, J. (a).
 In Bank.

Brougham now moved for a rule to shew cause why there should not be a new trial. He contended, that as the power of attorney was given by Miss Fitzgerald to the firm of Freshfield & Kaye, she must be considered as a client of the house, and that the money of the plaintiffs was paid in discharge of the liabilities of the firm; and further, that, as the plaintiffs lent their money on a representation that it was for Mr. Legh, who was avowedly a client of the firm, it was lent on the credit of both the defendants.

BAYLEY, J.—It would stand thus: that Mr. Charles Kaye, being partner of a house, states, (what is not true), that the house want to borrow money for Mr. Legh. Now,

(a) Mr. Justice HOLROYD was in the Bail Court, and Mr. Justice LITLEDALE had gone to chambers.

1826.
LOYD
v.
FRESHFIELD.

unless you connect Mr. Freshfield with the transaction, it is not evidence against him.

Brougham.—But, my Lord, to borrow money for their clients, was within the scope of their business as attornies. I have further to object, that there was not legal evidence of the fact that the initials “C. K.” were placed against the entry of the notes in the plaintiffs’ books. I called the clerk to prove the loan of the notes, and he refreshed his memory, as to the numbers, by an entry made by himself; and Mr. *Scarlett* cross-examined him as to the initials.

BAYLEY, J.—Were not the initials “C. K.” a part of the entry you examined to?

ABBOTT, C. J.—Yes. And if you make one half the entry evidence, ought not the other side to have the rest of the entry, if they wish it? It would be a disgrace to the administration of justice, if half an entry could be read without the rest.

BAYLEY, J.—The witness can only say, This entry is in my hand-writing: I have no doubt that the numbers of the notes are right, because they are in this book. Now, if he speaks so far from the entry, he ought to give the whole of it.

Brougham.—Then, my Lord, it should have been left to the Jury to contrast the entry with Charles Kaye’s assuming to act for Mr. Legh, a client of the house.

BAYLEY, J.—Is it a regular mode of doing business to lend 7000*l.* without any security but such a check as this, and without any voucher from the client?

Brougham.—We also submit, that, if this money was borrowed by Charles Kaye alone, and was applied in dis-

charge of the liabilities of the firm, both partners are liable.

1826.

LOYD

v.

FRESHFIELD.

ABBOTT, C. J.—Taking the evidence together, it appeared to me, that the advance was to Charles Kaye alone, and not to Freshfield & Kaye. As to any rule, that if one partner borrows money on his separate credit, he, by applying it to partnership purposes, thereby makes the house liable; I wish it to be distinctly understood, that I do not subscribe to that doctrine. I considered, that these were private transactions of Charles Kaye, in fraud of his partner.

BAYLEY, J.—It seems to me, that there is no ground for disturbing this verdict. In point of law, one of several partners may pledge the partnership name for money *bond fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lenders cannot recover against the other partners, if the money be misapplied. The plaintiffs lend to Charles Kaye alone: the sum is very large; and there is no document, not even a letter from Mr. Legh, stating that he wants any money; and no deed passes. Now, is this a loan that a man would be expected to make? If a man lend where no prudent man ought, he is himself answerable if there be any thing wrong. It is said that 1800*l.* and 200*l.* went into the joint funds of Freshfield & Kaye, over which Charles Kaye had no control. But I answer, that it is not sufficient to shew, that the money was applied to the purposes of the house, unless the firm had fair ground to presume that it was properly borrowed for them: if this were enough, you would enable one partner to defraud the others. There were 5000*l.* to be sent to Mr. Tate, from the Albion. If Mr. Kaye had not obtained this loan from the plaintiffs, Freshfield would have found

1826.
 Loyd
 v.
 FRESHFIELD.

that 1800*l.* were misapplied: that would have drawn his attention to the matter. But by this loan he is lulled into security, and supposes all to be regular. If Messrs. Loyd & Co. lend money irregularly, they cannot sue Mr. Freshfield if it be misapplied. It was a negligent act, at least, in the plaintiffs to lend it; and they therefore cannot call on an innocent party for its repayment.

Rule refused.

Oct. 28*th*.

THOMPSON and Others v. TRAIL and Others.

Where the Master of a ship gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up.

If such a receipt is in the hands of the consignor, who, after the failure of the consignee, demands the goods, and the Captain refuse to deliver them, assigning as his reason, that he has signed a bill of lading to the consignee, this is a conversion; although the consignor did not tender either the freight or a compensation for the trouble of loading. And the fact, that one of the consignors said to one of the consignees, after the failure, that he

was sorry for it, but would do as the other creditors did, will not make it less a conversion, if that conversation was unknown to the Captain. However, if the Captain, instead of assigning the reason he did for the non-delivery, had said, "the goods are now on board, and I must take them to their destination," that would have been no conversion. The fact, that the ship is named by the consignee, makes no difference as to a stoppage *in transitu*.

TROVER for ten barrels of bar tin. Plea—General issue.

The plaintiffs were lead and tin merchants, and the defendants the owners and master of the ship *George and Mary*. It was proved, on the part of the plaintiffs, that, on the 23*d* of January, 1826, the plaintiffs received an order from Messrs. May, Aylwin, & Co., of St. Mary-axe, London, for the tin in question, to be shipped on board the *George and Mary*, for Leghorn. The goods were shipped on the 24*th*, and the plaintiffs took the following receipt from the mate:—

"Received on board the *George and Mary*, Captain Brown, for Leghorn, from Thompson, Farnworth, & Co., Dowgate Iron Wharf,



N^o. 1/10

10 Barrels Tin.

"Jan. 24, 1826.

"John Swan, Mate."

This receipt the plaintiffs kept in their own possession; and it was proved, that May, Aylwin, & Co. stopped payment on the 4th of February; and that, on the 6th, a clerk of the plaintiffs went on board the *George and Mary*, and, producing this receipt, demanded of the Captain that the goods should be delivered back. The Captain refused to deliver them, saying, that he had signed a bill of lading to May, Aylwin, & Co.

1826.
THOMPSON
v.
TRAIL.

Campbell, for the defendants.—I submit, that this is no conversion. These goods were shipped for Leghorn, and in the hold, the ship being ready to sail. The goods are not delivered to the plaintiffs, it is true; but the goods were part of a general cargo, and no tender was made, either of the amount of the freight, or of any compensation for the trouble occasioned. The plaintiffs had no right to have them delivered up; and your Lordship cannot possibly hold this to be a conversion, unless the owner of goods on board a ship has a right, at any time before her sailing, to have the goods delivered up to him, without any offer of compensation.

ABBOTT, C. J.—That alone would not be a conversion; but the Captain says, he has signed a bill of lading. If the Captain says, “I won’t deliver the goods to you, but will deliver them to A., B., or C.,” that is a conversion.

Campbell, to the Jury.—The receipt given to the plaintiffs is not in the form of those in the cases relied on. They were “shipped on account” of the sellers; here, the receipt is merely “from” the sellers; leaving it doubtful on whose account they were shipped. Here, not only were the goods invoiced to May, Aylwin, & Co., but the ship was named by them in the order.

ABBOTT, C. J.—The ship’s being named by the buyer makes no difference as to stoppage *in transitu*.

1826.
THOMPSON
v.
TRAIL.

Evidence was given, on the part of the defendants, that Mr. Farnworth, one of the plaintiffs, saw Mr. May on the same day that May, Aylwin, & Co. stopped payment; and that, after expressing his regret at their failure, Mr. Farnworth said, that they should be willing to do as the other creditors did.

ABBOTT, C. J.—It has been decided, that where a receipt is given for goods put on board a ship, it behoves the Master not to sign a bill of lading till that receipt is given up; and it is highly convenient that the law should be so: if it were not so, it would be in the power of the Master of the ship to elect which party should have the goods. In one case it was held, that the circumstance of the seller's name being omitted in the receipt, made no difference. As to the conversation between Mr. Farnworth and Mr. May, I don't see how that can affect the defendants; because the defendants were strangers, and could not have been influenced by it. If the Captain had been apprised of that conversation, at the time of his signing the bill of lading, it would have been most important.

One of the Special Jury.—Is it your Lordship's opinion, that, when the goods were demanded, the Captain was obliged to give them up?

ABBOTT, C. J.—If the Captain had said, when the goods were demanded, "I cannot give them up: they are on board, and I must take them to Leghorn;" I should have held, that that was no conversion; but instead of that, the Captain says he has signed a bill of lading: and a refusal on that ground, is, in my judgment, a conversion.

Verdict for the plaintiffs.—Damages, 180*l*.

Scarlett and Comyn, for the plaintiffs.

Campbell, for the defendants.

[Attornies—*Vandercom & Comyn*, and *Swain & Co.*]

In the ensuing Michaelmas Term, *Campbell* moved to set aside the verdict, but the Court refused the rule.

1826.
THOMPSON
v.
TRAIL.

In the case of *Craven v. Ryder*, 6 Taunt. 433, where the receipt was, "Received on board the *George*, for *Hamburgh*, for and on account of" (the plaintiffs, &c.) Lord C. J. *Gibbs* lays down, that "the practice is, that the person who is in possession of the lighter-man's receipt is the person entitled to the bill of lading, which ought to be given only to the holder of that receipt; consequently, the holder of that receipt retains a control over the goods, at least, until he has exchanged the receipt for the bill of lading." And in the case of *Buck v. Hatfield*, 5 B. &

A. 632, where goods were sold free on board, and, upon their shipment, the agent of the consignors tendered a receipt, which the Mate (in the Captain's absence) refused to sign, and next day signed bills of lading to the consignees; it was held, that the consignors had a right to stop *in transitu*, on the insolvency of the vendees. And *Abbott*, C. J., observed, that it was important for the plaintiff to have the receipt; for, so long as he retained possession of it, he was enabled to interpose a delay on the delivery of the goods.

Adjourned Sittings at Westminster, after Trinity Term, 1826.

BOWRING and Another v. STEVENS.

Oct. 30th.

CASE.—The first count in the declaration stated, that the defendant carried on the trade of a publican, at a certain messuage called the King and Queen, situate in Duke Street; and that the plaintiff had agreed to purchase the lease of the house, and goodwill of the trade, at 2350*l.*; and

If the declaration state that the defendant falsely represented that in his public-house "his returns had averaged, and then averaged 300*l.*

a-month." This allegation is proved by evidence that he said he was "doing 300*l.* a-month in the house:" the fact, that he named his brewer, and kept a pass-book of his beer and spirits, and that the plaintiffs neither inquired of the brewer, nor asked for the pass-book, do not go in bar of the action, but are fit matter for the consideration of the jury, on the question, whether the defendant practised a fraud and deceit on the plaintiff. When it is objected, that an agreement which bears a 1*l.* stamp, is inadmissible, because it contains more than 1080 words, the counsel making the objection must be prepared with a witness, who can prove that he has counted the words, and can positively state their number. The receipt for the penalty put on an agreement at the stamp-office, when it is stamped there, on payment of the penalty, is not to be reckoned in counting whether the agreement, "with every receipt, &c. indorsed thereon," contains 1080 words, although the agreement cannot be read without such receipt for the penalty, is indorsed on it.

1826.
 BROWNING
 v.
 STEVENS.

that the defendant, at the time of that bargain, falsely represented that the said house "was doing 150*l.* *per* month in Foreign and British spirits, and selling from twelve to thirteen butts of beer *per* month of Whitbread's, and in all was doing 200*l.* *per* month;" and that the plaintiff in consequence purchased and paid for, &c. The count then proceeded to aver the representations to be false. The second count stated, that the representation by the defendant was, "that his returns in his said trade and business as a publican, *had averaged, and then averaged, 300*l.* per month.*" The third count stated a representation, that "he received from the sale of Foreign and British spirits, compounds, and wine, 200*l.* *per* month." Plea—General issue.

It was proved, that during the negotiations for the purchase of the house, the defendant was asked as to the extent of his trade, and he stated that he did *about 200*l.* a-month* in spirits and wine, and 300*l.* a-month altogether; and he stated that Whitbread was his brewer. It appeared, that persons who keep public-houses have pass-books, in which the beer and spirits are entered as they receive them: but the persons who made these inquiries for the plaintiffs, did not ask for a sight of the pass-books, nor did they inquire at Messrs. Whitbread's what beer they had sold to the defendant. The agreement, as stated in the declaration, was put in.

J. Williams, for the defendant, objected, that it was not properly stamped. By the stamp-act, 55 Geo. 3, c. 184, every agreement, "together with every schedule, receipt, or other matter, put or indorsed thereon, or annexed thereto, where the same shall not contain more than 1080 words, being the amount of fifteen common law folios or sheets, of 72 words each," is to be stamped with a 1*l.* stamp; and if there be a greater number of words, 1*l.* 15*s.* Now this agreement, together *with a receipt on the back of it*, contained more than 1080 words.

ABBOTT, C. J. — It is a general rule, that where an ob-

jection of this sort is made, the party must be prepared to prove the fact. We never wait on such objections as this. Have you a witness now ready to prove that he has counted the words, and who can tell us on his oath what the number is?

1826.
BROWNING
v.
STEVENS.

J. Williams.—He has counted the words of the agreement, but not of the receipt; because we have no copy of it.

ABBOTT, C. J.—I will allow to count the words of the receipt now.

The defendant's counsel then called a witness, who proved that the duplicate of the agreement, which was in the defendant's hands, contained fourteen folios and thirty-seven words more. He counted the words in the receipt, which were forty-eight, which brought it to thirteen words over fifteen folios.

When the receipt came to be looked at, it was the receipt for the penalty paid at the stamp-office for stamping the agreement, it having been originally without a stamp.

ABBOTT, C. J.—That receipt must not be counted in.

J. Williams.—But, my Lord, the agreement cannot be read without it.

ABBOTT, C. J.—It is no part of the agreement.

The agreement was read, and evidence was given to shew that the business of the house was much less than the defendant had asserted.

J. Williams objected, that none of the counts were proved. As to the representation in the first count, the witness, who was to prove that, qualified the re-

1826.
 BOWRING
 v.
 STEVENS.

presentation by the introduction of the important word "about," instead of proving a positive representation of 200*l.* a-month. The second count stated that the business had *averaged, and then averaged, 300*l.* a-month.* Now, in the evidence, the defendant merely asserts that of the then present time, but says not a word about averaging; and there is no evidence at all applicable to the third count.

Scarlett, contra. — This is said to be matter of variance: but this not being a contract, it is sufficient if we prove enough of our declaration to sustain a case of fraud. As to the first count, it is said, that the word "about" occurs; but it must be taken, that the defendant did not mean to represent the exact quantity of business he was doing; so that if he said that he was doing 150*l.* a-month, and he proved that he sometimes did 149*l.*, and sometimes 151*l.*, that would be proof of his assertion, considering what that assertion fairly imported. As to the second count, the question is, whether, if a man says I am doing business to the extent of 300*l.* a-month, it does not mean that his business averages that. If so, the allegation and the evidence are substantially the same.

ABBOTT, C. J.—I doubt whether the first count is proved; but I take it, that the defendant's statement denotes that his business averaged 300*l.* a-month.

The defendant's counsel then contended, that as the plaintiff neglected to obtain all the information they might have procured, and omitted to inquire at Messrs. Whitbread's, and to call for the pass-books, they could not maintain an action for the false representation, it being laid down by a very able lawyer, that, "if the party had the full means of detecting the fraud, and ascertaining the truth, and neglected to inform himself of it when he might easily have done so, it seems that an action for deceit can-

not be supported, and *vigilantibus non dormientibus jura subveniunt* (a)."

1826.

BROWNING

STEVENS.

ABBOTT, C. J.—The question here is, whether, on the whole of the evidence, the jury are satisfied that the defendant practised a fraud and deceit on the plaintiffs; and in forming their judgment on that question, the jury ought to take into their consideration the facts, that the plaintiffs might have asked for the pass-books, and have inquired at the brewers; and they should also make reasonable allowance for the sort of representations a man always makes, when he is going to sell any kind of property.

Verdict for the plaintiff.—Damages, 200*l*.

Scarlett, Gurney, and Lee, for the plaintiffs.

J. Williams, for the defendant.

[Attornies—*Sidney*, and *Burgoyne & Son*.]

(a) 2 Stark. Ev. 471.

In the ensuing Michaelmas Term, a new trial was applied for, but the Court refused the rule.

BRATHWAITE *v.* CHURCHILL.

Oct. 31st.

ASSUMPSIT for goods sold. Plea—General issue.

This was an undefended cause, and the plaintiff claimed 25*l*.

A witness stated, that he called on the defendant, who said that he could not pay the debt, but would give a bill for it. The amount of the debt was not mentioned; but the defendant spoke of having been arrested for it.

If the defendant has said that he cannot pay a debt, but will give a bill for it, and the amount be not mentioned, but the defendant speak of having been arrested for it; proof of this admission will entitle the plaintiff to a verdict

ABBOTT, C. J.—What the amount of the debt was, is

for 10*l*., as the defendant could not have been arrested for a less sum.

1826.
 BRATHWAITE
 v.
 CHURCHILL.

left wholly uncertain in this evidence; but as he could not be arrested for less than 10*l*., I think that this may be sufficient to entitle the plaintiff to a verdict for that sum.

Verdict for the plaintiff.—Damages, 10*l*.

Rowe, for the plaintiff.

[Attornies—*Showbridge*, and *Moore*.]

See the case of *Dixon v. Deveridge*, ante, p. 109. Nothing is more indiscreet in cases of goods sold, or work and labour, which are expected to be undefended, than to trust to proof of a supposed admission of the debt to a witness, instead of proving the delivery and price of the goods in the one case, and the doing of the work and its value in the other; because it so often happens, that the witness who

is to prove the admission says, that no amount was mentioned; and thus it is not uncommon for the plaintiff either to be nonsuited, or obliged to take a verdict for much less than his demand; in cases where he could have easily made out his full claim, if one or two other witnesses, who were not subpoenaed under the mistaken notion of economy, had been in attendance.

Nov. 1st.

BOND *v.* RUST and Others.

If in an action for false imprisonment, two of the defendants are acquitted, because they were constables, and the venue was not laid in the proper county, another defendant is not entitled to be acquitted as acting in their aid, if in his plea he state, that he, "as owner of a certain house, and the other defendants, as constables, acting in his aid, took the plaintiff, &c."

ASSAULT and false imprisonment. Pleas—1*st*. The general issue; and 2*d*. That the plaintiff was making a disturbance and doing wilful damage in the house of the defendant Rust; and that he, as owner of the said house, and the other two defendants as constables *acting in his aid*, took the plaintiff to a watch-house, as they lawfully might (a). Replication—*De injuria*.

From the evidence it appeared, that the defendant Rust was the owner of a house in Charlotte Street, Blackfriars Road, in the county of Surry; and that the plaintiff and other workmen were taking down a room of the house, by the consent of a person who had been Rust's tenant; and

(a) This justification was framed on the stat. 1 Geo. 4, c. 56, commonly called the malicious trespass act.

that the three defendants took the plaintiff to a watch-house, where he was detained all night, but was discharged by the magistrate next day.

1826.

BOND

v.
RUST.

ABBOTT, C. J.—As the whole of this occurred in Surry, the constables must be acquitted (*b*).

Gurney for the defendants.—I submit that Rust is also protected, because he was acting in their aid.

ABBOTT, C. J.—The plea states, that they were acting in his aid, and not he in their's; and he is, therefore, not entitled to that protection.

A verdict was taken for the plaintiff as against Rust, subject to the opinion of the Court above, on the question, whether the defendant Rust could justify what he had done, under the stat. 1 Geo. 4, c. 56. The constables were acquitted.

Denman and *E. Lawes*, for the plaintiff.

Gurney and *Chitty*, for the defendants.

[Attornies—*Richings*, and *Meymott*.]

(*b*) See the stat. 21 Jac. 1, c. 12, s. 5, and *ante*, Vol. I. p. 41, n. (*a*).

RAGGETT v. BISHOP.

Nov. 2d.

ASSUMPSIT to recover 10*l.* 10*s.*, being the amount of one year's subscription, alleged to be due from the defendant as a member of the Cocoa-tree Club, in St. James's Street, for the year 1824.

It appeared from the evidence, that the plaintiff was master of that club, and that the defendant became a mem-

The master of a club-house is the proper person to sue one of its members for the arrears of his subscriptions; and if by one of its rules, every member is to be taken

as continuing so, unless he give previous notice of his intention to discontinue being a member, he is liable to be sued for his arrears of subscriptions, unless he can prove that he gave such notice.

1826.
 RAGGETT
 v.
 BISHOP.

ber in the year 1823, the subscription being ten guineas a-year. By the rules of the club, (which were put in), it appeared that the subscription was to be paid every year, on the 1st of January; and that if no notice were given by members of their intention to discontinue, they were to be considered as members. By one of these rules, the master was empowered to collect the "house bills."

Scarlett for the defendant.—I submit that the plaintiff is not the proper person to sue. The master of a club is merely the agent of that club, who have their general meetings, and make regulations independent of the master.

ABBOTT, C. J.—I think that as the plaintiff is the master of the house, every member must be considered as a debtor to him for his arrears. The members may take upon them the management of the affairs of the club; but I think they are bound to pay the master; and if so, the defendant is liable in this action, unless he can shew that in the year 1823, he gave notice of his intention to discontinue his subscription after that year.

Verdict for the plaintiff.—Damages, 10*l.* 10*s.*

Gurney and *Chitty*, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Fisher & S.*, and *Johnstone*.]

Nov. 3d.

WILKINS, Assignee of KEEN, an Insolvent, v. FORD.

An insolvent debtor is not a competent witness for the plaintiff in an action by his assignee to recover a sum due for work done by him before his insolvency.

ASSUMPSIT for work and labour done by the insolvent before his insolvency. Plea—General issue; with a notice of set off.

The plaintiff's title, as assignee, was made out, and the insolvent was called to prove the work done. On the *voire dire* he stated, that his estate would not pay 20*s.* in the pound.

Abraham for the defendant.—I submit that he is not a competent witness. This is not like the case of a certificated bankrupt; because, till 20s. in the pound are paid, an insolvent's future effects are liable.

1826.
WILKINS
v.
FORD.

ABBOTT, C. J.—Certainly, and the more that is paid by the effects that are assigned under the insolvency, the less will be to be paid by him afterwards, out of his future effects: therefore, by increasing the verdict to-day, he decreases his own future liability. I think he is not a competent witness.

The case was made out by other evidence.

Verdict for the plaintiff.

Gurney and *Andrews* for the plaintiff.

Abraham, for the defendant.

[Attornies—*Platts*, and *Stephens*.]

BARNES v. WINKLER.

Nov. 3d.

ASSUMPSIT for board and lodging furnished to the defendant's wife up to the month of October, 1824. Plea—General issue.

For the plaintiff, a promise to pay 2l. 12s. was relied on.

The defence was, that on the 23d of September, 1824, the plaintiff summoned the defendant to the Middlesex County Court, for the board and lodging up to that time; and that the case, after being fully heard, was dismissed on merits.

To prove this, a clerk from the County Court produced

A Court for the recovery of debts under 40s., may give judgment for the plaintiff, although it appears that the debt was above 40s., if the plaintiff will waive so much of his debt as will bring his claim under 40s., provided there be nothing in the act

of Parliament constituting that Court which prevents his so doing. The judgment of a Court for the recovery of debts under 40s. is not conclusive. But proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits, is proper for the consideration of the Jury.

1826.
BARNES
v.
WINKLER.

the book kept at that Court, in which he made minutes of the cases as they were disposed of: he stated, that this case was dismissed on merits; and that although that Court could only take cognizance of debts under 40s., the case would not be dismissed, because the debt appeared to be greater in amount than 40s., provided that the plaintiff consented to waive enough of his debt to bring it under 40s.

ABBOTT, C. J. (in summing up:)—If a man dismiss his wife without reason, and any one supply her with necessaries, the husband must pay for them; and so he must if they are supplied by his consent; but if the wife goes away of her own accord, the husband is not liable. The plaintiff here relies on the husband's consent. Now the defence in this case is, that the plaintiff sued on his claim for this very board and lodging, which is the subject of the present action, in the County Court, and that his complaint was dismissed. We have been told, that if the debt be of a greater amount than that Court can take cognizance of, the plaintiff has judgment in his favour, if he waives enough to bring it under 2l.; and in point of law, if a debt of 2l. and more is due, and the plaintiff consents to waive it, and to claim only 1l. 19s. 6d., and wishes to resort to a cheap tribunal for the recovery of it, I see no reason why he may not do so, provided there be nothing in the Act of Parliament constituting that Court which prevents him. The judgment of the County Court is in this case not conclusive; but it is fit matter for consideration in estimating whether the wife of the defendant was at the house of the plaintiff by the assent of her husband, because, something might have occurred at the County Court, to shew that the plaintiff took her on his own responsibility.

Verdict for the plaintiff.—Damages, 2l. 12s.

Andrews, for the plaintiff.

Gurney, for the defendant.

[Attornies—*Platts*, and *Harmer*.]

Courts of Requests are established by different acts of Parliament in various parts of the kingdom. And if, in a case within their jurisdiction, a plaintiff sues in the superior Courts, he is put under great disadvantages, such as paying double costs, &c. These Courts have jurisdiction in a great many large towns, and also in many cases over hundreds, wapentakes, parishes, &c. They are much too numerous to be enumerated in this note; but the places in which they have jurisdiction, and the extent of the powers of each, with all other necessary information, will be found in *Mr. Pratt's* work on Courts of Requests; some of them have only jurisdiction to the amount of 40s., many more extend to 5l.; among which are those of London and

Southwark. That of Bath (which also includes the parish of Walcot, and a great deal of the surrounding neighbourhood) extends to 10l.; and this, and several others, not only have cognizance over cases of debt, but also of trover, detinue, trespass in taking goods, rent, bills of exchange and promissory notes, and bonds for the payment of money.

The cases on the subject of costs, where actions have been brought in the superior Courts, where the subject matter was within the jurisdiction of a Court of Requests, will be found in 2 Arch. K. B. Pr. 294.

As to actions brought in England, where the cause of action arose in Wales, See *Moore v. Williams*, ante, Vol. I. 468.

1826.
BARNES
v.
WINKLER.

APPLETON v. CAMPBELL.

Nov. 4th.

ASSUMPSIT for board and lodging. The defence was, that the defendant was an immodest woman, and used the lodgings for the purposes of prostitution, to the knowledge of the plaintiff.

To substantiate this, another female, who lodged in the house, and who was called for the plaintiff, proved, on her cross-examination, that the defendant was in the habit of receiving male visitors, and that the plaintiff used sometimes to open the door for them; and that the plaintiff told her, that the defendant was an immodest woman.

If a party lets lodging to an immodest woman, to enable her to consort with the other sex, he cannot recover in an action for the lodging so supplied; but if the woman merely lodges there, and receives her visitors elsewhere, he may.

ABBOTT, C. J.—If a person lets a lodging to a woman, to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied. But if the defendant had her lodgings there,

1826.
 APPLETON
 v.
 CAMPBELL.

and received her visitors elsewhere, the plaintiff may recover, although she be a woman of the town, because persons of that description must have a place to lay their heads; but if this place was used for immoral purposes, the plaintiff cannot recover.

Verdict for the defendant.

Gurney and Abraham, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*G. Williams*, and *Carlton & H.*]

See the case of *Born v. Bennett*, 1 Camp. 246, and the cases there cited.

COURT OF COMMON PLEAS.

Sittings at Westminster, in Trinity Term, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

May 27th.

DOE, on the demise of SCOTT, v. MILLER.

In an action of ejectment, the plaintiff must be nonsuited, if it be proved that a notice to quit at the end of six months was given by the lessor of the plaintiff to the occupier of the premises a short time before the bringing of the action.

EJECTMENT to recover possession of certain premises at Westminster, for the breach of the covenants to pay rent and repair.

On the part of the defendant, it was proved, that a short time before the action was brought, a notice, dated the 21st of December, 1825, was given by the lessor of the plaintiff to the defendant, requiring her to quit and deliver up the premises on or before Midsummer-day, 1826, describing them in these terms, "which you now hold of me as tenant from year to year."

Vaughan, Serjt. submitted, that this notice could have no operation to defeat the action, as the party might not.

at the time when it was given, have discovered the state of the premises.

1826.
DOE
v.
MILLER.

Adams, Serjt., contended, that, pending the notice, the action was not maintainable, inasmuch as it was a waiver of the forfeiture, and a continuation of the tenancy. He cited *Doe v. Allan* (a), where it is said, that the receipt of rent is such an affirmation of a tenancy, as to prevent the bringing ejectment for a precedent forfeiture.

BEST, C. J.—The giving a notice to quit is similar to the receipt of rent. Otherwise, a man might be at liberty to say to his tenant, “you may stay in for six months,” and then immediately after bring an ejectment against him. This is my opinion, in the absence of any authority which decides the point. I think the plaintiff, under the circumstances, must be called.

Nonsuit, with leave to move (b).

Vaughan, Serjt., and *Steer*, for the plaintiff.

Adams, Serjt., for the defendant.

[Attornies—*Young, S. & E.*, and *Brill*.]

(a) 3 Taunt. 78.

(b) No motion was made.

1826.

Second Sitzings at Guildhall in Trinity Term, 1826.

June 1st.

PRATT v. WILLEY.

If an agent employed to sell coals, make a bargain in his own name with a tradesman to furnish him with coals on credit, for which, in return, he is to receive goods on credit, and the coals and the goods be both delivered, the real seller of the coals may recover the price of the tradesman, if his name be in the ticket sent with the coals as the seller, because the tradesman after that is bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal.

ASSUMPSIT for goods sold.

A man named Surtees, being authorised to sell coals as the agent of the plaintiff, went to the defendant, who was a tailor, and in his own name made a bargain to furnish the defendant with coals on credit, for which the defendant was to furnish him with clothes also on credit. At one time, when he called, he gave to the defendant's wife a card, on which was written "Surtees, Coal-merchant," &c. When the coals were delivered, there was in the tickets sent with them the name of Pratt, as the seller. The defendant had delivered clothes to Surtees in performance of his part of the bargain.

For the defendant, it was contended, that the plaintiff had no right to sue him for the coals, as the bargain had been made with Surtees as a principal, without any knowledge of his being the plaintiff's agent, and therefore that the price of the clothes might be set off against that of the coals. The case of *George v. Clagett*, was cited (a).

BEST, C. J., was of opinion, that, as the name of the plaintiff was in the tickets as the seller of the coals, the defendant ought to have made inquiry into the nature of the situation of Surtees, and should not, after that, have

(a) 7 T. R. 359. The point decided in that case was, that "If a factor, who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal."

dealt with him as a principal. His Lordship left the question to the jury, who found a

Verdict for the plaintiff.

1826.

PRATT

WILLEY.

Wilde, Serjt., and *Crowder*, for the plaintiff.

Vaughan, Serjt., and *Patteson*, for the defendant.

[Attornies—*Brutton*, and *Wright*.]

WARE v. JUDA.

June 16th.

THE first count in the declaration stated, that in consideration that the plaintiff would lend and deliver to the plaintiff a certain horse of his, to be driven, harnessed to a chaise, from *Dorset Crescent to Dartford, and back again*; the defendant undertook that he would not perform another and different journey, and that he would drive and use the horse in a moderate, careful, and proper manner. It then averred, that the plaintiff did lend the horse, but that the defendant, not regarding his promise, went from *Dorset Crescent to Chatham, and back again*; and that he so immoderately, violently, carelessly and improperly drove the horse, that its knees and head were much cut and injured; in consequence of which the plaintiff was deprived of the use of it for the space of ten weeks, and had to pay a certain sum of money for its cure, and was ultimately forced to sell it for a less price than it would have fetched if the defendant had not so acted. There were other counts, omitting different parts of the special matter, and one stating generally that the defendant's promise was, that "he would take due and proper care" of the horse. Plea—*Non assumpsit*.

An allegation in a declaration, that the plaintiff lent a horse, is supported by evidence, that what he lent was a mare. In an action for injury to a horse, proof that the defendant, on being charged with driving it from London to Chatham, instead of to Dartford, according to his undertaking, stated, that, in fact, he only drove to Dartford, is sufficient to support an allegation that the contract was to drive only to Dartford; and it is not necessary to offer distinct evidence of what took place at the time when the agreement was made.

In such an action, if it ap-

The witnesses in their evidence spoke of the animal as

pear that the animal was the property of the plaintiff, but let by a stable-keeper to the defendant for a pecuniary recompense, the judge at the trial will not call upon the plaintiff to shew that he was authorised to let horses for hire, if the defendant does not produce any statute or other authority making regulations on the subject. Nor, in the absence of such authority, will he reserve the point.

1826.
WARE
v.
JUDA.

a *mare*. The only evidence on the part of the plaintiff of the terms of the contract was, that the defendant, in a conversation with the plaintiff subsequent to the injury said, that he had not driven the mare all the way to Chatham, but only to Dartford, and that he had hired another to go from Dartford to Chatham.

Vaughan, Serjt., upon this made two objections: *First*, that the term *horse* used in the declaration was incorrect, it appearing from the evidence that a *mare* was the thing lent; and, *Secondly*, that the evidence given of the terms of the contract was not sufficient to support the allegation of it.

BEST, C. J., was of opinion that neither of the objections was tenable.

Vaughan, Serjt., then called a witness, who stated that he went with the defendant to the livery stables of a man named Tay, and that the defendant agreed with Tay for the mare in question, to go to Dartford, for 15s. for the day. Upon this, he submitted, that the plaintiff was bound to shew that he was licensed to let horses.

BEST, C. J.—I think not: shew me some statute upon the subject.

Vaughan, Serjt.—Will your Lordship reserve the point.

BEST, C. J.—Certainly not. You have not made me doubt. If your client wishes me to give him an opinion on the revenue laws, he must lay some authority before me.

There was conflicting evidence as to the cause of the injury.

The jury found for the plaintiff.

Taddy, Serjt., and *Payne*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Watson & Son*, and *Isaacs*.]

1826.

WARE

v.

JUDA.

MATTHIAS v. MESNARD.

June 16th.

TROVER for corn. The plaintiff was a corn-merchant, residing in Wales, and the defendant landlord of premises occupied by Messrs. Ryland & Knight, lightermen and granary-keepers to Messrs. Ryland & Son, who were the plaintiff's factors in England. Messrs. Ryland & Son had no warehouses of their own, but deposited the corn sent them by the plaintiff for sale, in the warehouses of Messrs. Ryland & Knight. In the month of January, 1826, rent being due from Messrs. Ryland & Knight, the defendant put in a distress, and took some corn of the plaintiff's, which happened to be lying on their premises. To recover this corn, the present action was brought.

Corn sent to a factor for sale, and deposited by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it were deposited in a warehouse belonging to the factor himself.

Wilde, Serjt., for the plaintiff, contended, that corn placed in a public warehouse for the purpose of being sold, was not liable to be taken under a distress for rent; because warehouses would be injured if they could not afford protection to the goods of third persons, which were deposited in them.

Taddy, Serjt., for the defendant, denied that the action was maintainable. The indulgence of a factor has been extended to a wharfinger, but not to a warehouse-keeper. The cases determined have been of this nature. The first was the case of a wharfinger, on whose wharf goods are of necessity placed for importation or exportation; and it is on the ground of necessity that goods so placed are protected. The other was the case of

1826.
 MATTHIAS
 v.
 MESNARD.

goods in the factor's own warehouse; but in the present case we are carried a step farther.

BEST, C. J.—Look at what is quoted in the case of *Thomson v. Mashita* (a), from Lord Holt's opinion in the case of *Gisbourn v. Hurst*, where he says, "that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ, are for that time under a legal protection, and privileged from distress for rent;" and where his Lordship also alludes to a case of *Rede v. Burley* (b), where two tradesmen brought their wool to a neighbour's barn, which he kept for his private use, and it was held that it could not be distrained. I am of opinion, that there is no substantial difference between the case of a factor's warehouse and the warehouse of another which the factor uses.

Taddy, Serjt.—The plaintiff should have known that his factors had no warehouse, and should have placed his corn with some person who had one. This case is not founded on the necessity of trade. It is not necessary to employ a factor, who is to employ a warehouse-keeper under him.

BEST, C. J.—If the cases referred to had decided the insulated points of a factor's and a wharfinger's protection, I should have paused in my determination now. But the judges in those cases only confirmed the general principle. A landlord has by the general law a right to take any property found upon the premises of his tenant. But many years ago, in favour of trade, exceptions were made, as in the case of the delivery of cloth to a tailor, and in many other cases. A landlord must know that he cannot take the corn of other parties; and therefore, if his tenants are

(a) 8 Moore, 260.

(b) Cro. Eliz. 596.

granary keepers, he can take other security for his rent. What foreigner or what person living in the country would send articles to a granary-keeper, if they were to be put in danger in this way. It seems to me, that I should be breaking in upon a principle almost essential to the existence of trade, if I were to hold that this plaintiff is not entitled to recover.

Verdict for the plaintiff.

Wilde, Serjt., and *Jeremy*, for the plaintiff.

Taddy, Serjt., and *Carter*, for the defendant.

[Attornies—*Allen*, and *Parker & Sons*.]

TOWNE v. CROWDER, Esq. and Another, Sheriffs of Middlesex.

June 17th.

CASE against the defendants as Sheriffs of Middlesex, for a false return to a writ of *fieri facias*, sued out against Thomas George Western, at the suit of the plaintiff, indorsed, to levy 379*l.* 16*s.* 6*d.* besides, &c. The first count of the declaration stated, that the sheriff levied to the amount, and falsely returned *nulla bona*; and the second, that he could and might have levied, but that he neglected to do so. Plea—General issue.

It appeared, that a sum of 309*l.* was in the hands of Mr. Henchman, of the Sheriff of Middlesex's office, that sum having been paid into his hands by a person named Langdon. Some time after, a bill of sale had been executed by the sheriff to a person named Crook, of the goods taken by the sheriff under an execution against Western, at the suit of Mrs. Stone. The bill of sale was dated on the 10th of March, 1825. It also appeared, that Western lived in a large house in New Ormond Street, and used the goods included in that bill of sale; and that a considerable quantity of them were, by the direction of Western, removed off the premises in New Ormond Street, about the 22nd of January, 1826. On the 23rd of January, a writ of

In an action for a false return of *nulla bona* to a *f. fa.*, if the plaintiff shew the debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returned *nulla bona*. Nor, if the sheriff has the proceeds of the goods in his hands, is it any defence to shew that the *f. fa.*, on the return of which the action is brought, was delivered at the sheriff's office at a quarter past 5 o'clock on the day on which it is returnable.

1826.

MATTHEW

MESNARD.

1826.
 TOWNE
 v.
 CROWDER.

fiery facias was sued out against Western, at the suit of persons named Machin and Debenham, to levy 414*l.* 14*s.* 8*d.* and the present plaintiff was their attorney in that case. To that execution, the sheriff returned *nulla bona*; on which an action for a false return had been commenced, but had not been brought to trial. It also appeared, that the writ of *fiery facias* in the action of *Towne v. Western* (on the return of which the present action was brought,) was delivered at the sheriff's office on the 13th of February, at a quarter past 5 o'clock, and was returnable in eight days of the Purification (the same day). To this there was also a return of *nulla bona*, which was now alleged by the plaintiff to be false.

Vaughan, Serjt., for the defendants. — The writ of *fiery facias* was sued out by the plaintiff, after the Court had risen on the last day of the Term; and after that day the sheriff had no power to do any thing. There is no evidence that the sheriff had notice of any goods that Western was possessed of; and therefore no negligence can be imputed to the sheriff. Another point, which must put an end to this action, is:—Machin and Debenham's execution was prior to this. Now, if the bill of sale is good, Western had no goods; and if the bill of sale is bad, then the goods are absorbed by that execution: but either way there could be no goods to satisfy the plaintiff's execution. And as an action is brought for a false return to Machin and Debenham's writ, if the goods were Western's, the sheriff would, if a verdict was found against him here, have to answer twice for the same goods.

BEST, C. J.—If you have returned *nulla bona* to Machin and Debenham's execution, that will not protect you.

Vaughan, Serjt. — We are also in a condition to prove, that, before both these executions, the goods were sold by bill of sale to a person named Crook, who kept a man in

possession of them. If the bill of sale is valid, the goods did not belong to Western, and the return is a true one; and as to the late delivery of the writ of execution, it should be observed, that the sheriff could not instruct counsel to move to enlarge the time for returning the writ, as it was on the last day of the Term, and the Court had risen.

1826.
TOWNE
v.
CROWDER.

BEST, C. J.—If the sheriff had not been in possession of the proceeds of the goods, he had abundant cause to shew against an attachment; he might have stated that the execution was issued to hurt him, and not for the purpose of being executed.

On the subject of the bill of sale, evidence was given, that, on the 10th of March, 1825, Crook, who was the sheriff's broker, took the bill of sale of the goods at the desire of Western; and that a man belonging to the officer of the sheriff in Mrs. Stone's execution, kept possession; and Crook stated, in his cross-examination, that Western was to have the goods back again, if he could repay the amount, and that he (Crook) had been repaid the consideration money on the bill of sale, by a person named Langdon, who was a friend of Western, to whom he had agreed to execute an assignment of the bill of sale; and he also proved that Western paid the man who kept the possession.

BEST, C. J.—The sheriff has in this case returned, that there were no goods of Western, on which he could levy; and a sheriff is justified in so returning, unless he has the goods in his own possession, or has notice where they are. If, in the present case, the sheriff had not had a control over these goods, I should have told the jury, that the writ coming in at half-past five was too late, and that the sheriff was not bound to execute it. But here the sheriff keeps possession of the goods. There had been a writ of *fieri facias* at the suit of Machin and Debenham. If that had been executed, and these goods applied to it, that

1826.
 TOWNE
 v.
 CROWDER.

would have been a difference. But the sheriff returns *nulla bona* to that writ; and he cannot protect himself from the consequences of the false return by another. Then a bill of sale is set up. The question is, Whether the jury believe that to be a fair transaction, or whether the goods were really bought with the debtor's money; because, if so, it would be fraudulent. If Langdon bought the goods out and out, the bill of sale protects the goods; but if he only bought with Western's money, it is a fraud.

Verdict for the plaintiff—Damages, 370*l*.

Wilde, Serjt., and *Chitty*, for the plaintiff.

Vaughan, Serjt., and *Carrington*, for the defendants.

[Attornies—*Towne*, and *Smith & B.*]

June 19th.

SYMES v. LARBY.

In replevin, if the defendant avow for rent in arrear, and the plaintiff replies, *non tenuit*, on which issue is joined; if the plaintiff does not appear by himself or his counsel to open the pleadings, he may be nonsuited, although it is the defendant's record.

REPLEVIN. The defendant avowed as bailiff of Henry Jackson for rent arrear. Plea—*Non tenuit*; on which issue was joined.

No counsel appeared for the plaintiff.

BEST, C. J.—I think, as the plaintiff is not here by himself or his counsel, I ought to nonsuit.

Vaughan, Serjt., for the defendant.—It has been considered, that as it is the defendant's record, he must prove his case and take a verdict, though no one appears for the plaintiff.

Carrington for the defendant then opened the pleadings.

BEST, C. J.—I still think I ought to nonsuit.

Chitty, *amicus curiæ*.—I remember a case some years ago, exactly like this, in the Court of King's Bench. The difficulty raised there was, that, as it was the defendant's

record, the plaintiff could not lose his writ of *nisi prius*; but my Lord Chief Justice thought, that as the plaintiff did not appear, he might be nonsuited.

1826.
SYMES
v.
LARRY.

BEST, C. J.—I entirely concur with my Lord Chief Justice *Abbott* on this point. The plaintiff's counsel should appear to open the pleadings, and if the plaintiff does not appear when called, he must be nonsuited.

The plaintiff was then called three times, and not appearing, a nonsuit was recorded.

Vaughan, Serjt., and *Carrington*, for the defendant.

[Attornies—*R. Hughes*, and *Smith & B.*]

PROWETT v. CRACKNALL and
Another.

Replevin. Avowry for rent arrear. Plea—*Riens in arrear*.

The defendants had brought down the record. The plaintiff did not appear; the pleadings were not opened; but a nonsuit was entered immediately; and it was there said, that the Court of King's Bench had very lately, in *Bank*, decided that such was the proper course.

Vaughan, Serjt., and *Payne*, for the defendants.

[Attornies—*Bowden & W.*, and *Richardson & P.*]

[This case was tried at *Nisi Prius* before BEST, C. J., December 6th, 1826.]

A similar doubt was formerly entertained, whether a plaintiff could be nonsuited after a plea of tender, but it is now held that he may. See the case of *Anderson v. Shaw*, ante, p. 85.

SULLIVAN v. BISHOP.

June 23rd.

CASE for an illegal distress. The first count was for an *excessive* distress. The second count was for not selling, at the expiration of five days, under stat. 2 William & Mary, sess. 1, c. 5, s. 2. There was also a count in trover for the article seized.

A landlord has no right to distrain for double rent upon a *weekly* tenant, who holds over after a notice to quit.

It appeared, that, on the 6th October, the defendant distrained on the plaintiff, who was his tenant by the

1826.
 SULLIVAN
 v.
 BISHOP.

week, for a sum of 15*s.*, 5*s.* of it being for one week's rent *previous to*, and 10*s.* for another week's rent, (which was charged double,) *after* a notice to quit.

The article seized was a table, of the value of two guineas. The sum of 10*s.*, being the two weeks' single rent, was tendered on the 4th of October. The broker, when he seized on the 6th, did not demand any specific sum, nor was any tender made at that time. On the part of the plaintiff, the case of *Lloyd v. Rosbee*, 2 Camp. 453, was relied on, to shew that the defendant could have no right to claim double rent under the statute (a).

Wilde, Serjt., for the defendant, contended, that the action would not lie. The party had a clear right to distrain; and he only seized a single article. A second offer of the 10*s.* should have been made to the broker. A landlord is not bound to look round with a microscopic eye to select the nearest article in value to the sum claimed. The taking the same article for 15*s.* which might have been seized for 10*s.* is not such an excessive distress as will maintain an action. The statute, which speaks of double rent, is intended not as a penalty, but for the relief of the landlord. The sum is in the nature of an increased rent, and recoverable, as the former rent, on the original contract.

BEST, C. J.—The broker must be taken to have demanded the 15*s.*: if he had demanded the 10*s.* only, I think it would have done. If there had been no tender, I should have thought the difference of 5*s.* too small to support an action. I feel this description of tenants to be a class, with respect to whom the statute would do more good than any other, because it would be a dreadful thing to be put to bring ejectment against weekly tenants. But as my Lord *Ellenborough's* is the only authority upon that

(a) The point decided in that case is, that “debt for double value on 4 Geo. 2, c. 28, does not lie against a weekly tenant.”

subject, I shall act upon it. I am of opinion that the plaintiff is entitled to a verdict for small damages, as the defendant might have had all his rent. I will give my Brother *Wilde* leave to move for a nonsuit.

1826.
SULLIVAN
v.
BISHOP.

With respect to the not selling at the expiration of five days, it appeared that the writ in the action had been served before that time had expired.

Verdict for the plaintiff—Damages, 1s.,
the table to be given up.

Vaughan, Serjt., and *Comyn*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*J. M. Hill*, and *Richardson*.]

In the ensuing Michaelmas Term, *Wilde*, Serjt., moved, pursuant to the leave given at the trial, to enter a nonsuit, but the Court refused a rule.

CHINN v. MORRIS.

June 23rd.

TRESPASS and false imprisonment. Plea—General issue.

A constable proved, that the defendant, who was a butcher, gave the plaintiff, who was of the same business, into his custody, on a charge of stealing a quantity of fat; upon which he told the plaintiff that he must go to Union Hall; that the plaintiff made no resistance; and that in consequence no force was used. A charge of felony was preferred before the magistrate, and dismissed by him, because the defendant could not identify the fat as his property.

For the defendant, it was submitted, that the action would not lie, as there was no actual imprisonment, or assault; and as a malicious charge might be the ground of another and different form of action.

If a constable tell a person given into his charge, that he must go with him before a magistrate, and such person in consequence goes quietly, without any force being used by that constable, it is a sufficient imprisonment to support an action of trespass.

Evidence of reasonable suspicion of felony may be given in mitigation of damages, in an action of false imprisonment.

1826.
 CHINN
 v.
 MORRIS.

BEST, C. J. — I am of opinion that this is an imprisonment. I should think it an imprisonment, if a constable told me that I must go to Union Hall; for I should know that if I refused, he would compel me. I think it amounts to a trespass.

The case of *Stonehouse v. Elliott* was cited (a).

BEST, C. J., allowed evidence of reasonable suspicion of felony to be given in mitigation of damages; and in summing up, his Lordship told the jury that a justification would have been of no use, because the defendant could not have proved that a felony had been committed, as he could not identify the stolen property as his own. If the defendant intended to injure the plaintiff, and to prevent his being a rival in trade, then the plaintiff would be entitled to large damages; but if he honestly took him before a magistrate, believing that a felony had been committed, and that he was doing his duty to the public, then small damages would be sufficient. The defendant, as a plain unlettered man, might imagine that there was sufficient evidence, when a magistrate, knowing the law, might be of a different opinion. His Lordship then left it to the jury to say, under what motives the defendant had acted; and they returned a

Verdict for the plaintiff—Damages, one farthing.

(a) The point ruled in that case, as reported in 1 Esp. N. P. C. 273, that the action should be for malicious prosecution, was overruled on a motion for a new trial, which will be found in 6 T. R. 315; when it was held, that if one suspect a person of having robbed him, and deliver him over to a constable, such party, if innocent, may maintain trespass. And in the case of *Samuel v. Payne*, Doug. 345, it was held, that a constable may justify an arrest on a reasonable charge of

felony, without a warrant, *although it should afterwards appear that no felony had been committed*; but that a private person cannot. However, in the case of *Arrowsmith v. Lemmesurier*, 2 N. R. 211, it was held, that, where a constable shewed the plaintiff a warrant, and the party went with the constable to a magistrate, this was no imprisonment, as the warrant was only used as a summons. See also the case of *Russen v. Lucas*, *ante*, Vol. I. p. 153.

Wilde, Serjt., and *Wilde*, for the plaintiff.

Spankie, Serjt., for the defendant.

[Attornies—*Harmer*, and *Chester*.]

1826.

CHINN

v.

MORRIS.

BEFORE MR. JUSTICE GASELEE.

(*Who sat for the Lord Chief Justice.*)

WILSON (a Pauper) v. COHEN and Another.

June 25th.

ASSUMPSIT for money had and received to the plaintiff's use for the work and labour of a stevedore, to certain ships belonging to Messrs. Goldsmith & Co., to whom the defendants were brokers, and for which they had charged their employers the under-mentioned sums, *viz.* for the Albion 15*l.*; for the Alexander, 15*l.*; for the Alliance, 10*l.*; for the Duckenfield, 15*l.*; for the Harcourt, 25*l.*; for the Julius Cæsar, 15*l.*; for the Zephyr, 12*l.* 10*s.* There was a ship called the Wellesley, for which no charge under the head of stevedore had been made by the defendants. The declaration also contained counts for work and labour.

The defendants had employed the plaintiff to perform the duty of a stevedore to the ships in question. One of the partners in Messrs. Goldsmith's house, who was called as a witness for the plaintiff, said, that they knew that the defendants charged them more than they actually paid the workmen, but that they shut their eyes to the fact, on account of the great zeal manifested by the defendants in the management of their concerns. It appeared that the accounts between the defendants and Messrs. Goldsmith, were running accounts.

Wilde, Serjt., for the defendant, applied for a nonsuit.

GASELEE, J.—My opinion is very strongly against the

The brokers to certain ship owners, charged their employers certain sums of money for work done to their ships under the head of stevedore. The labour of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the shipowners were aware that the brokers charged them more than they paid the workmen, but made no objection, on account of their zeal and diligence:—Held, that one of the workmen, under such circumstances, could not maintain an action for the larger sums received by the brokers, as money had and received to his use.

1826.
WILSON
v.
COHEN.

plaintiff; but, as he is a pauper, I will not stop the cause, but give you leave to move.

Wilde, Serjt., then contended, that the plaintiff was not entitled to recover from the defendants the amount which they had charged to their employers. The title stevedore is an item which imports not a payment to a particular man, but the charges of loading the ships generally. The circumstance of there being no charge made under the head of stevedore for the ship *Wellesley*, shews that there was a particular mode of dealing between the defendants and Messrs. Goldsmiths, differing from that which existed between the defendants and the workmen employed under them.

A witness then proved that he had paid the plaintiff, during a period of two years, several sums of money for acting as stevedore to various ships, sometimes by previous agreement for a specific sum, and sometimes without any agreement. That, at the time of payment, the plaintiff had said, that he ought to have more, but took what was given, and subsequently accepted employment, for which he was paid at the same rate. A sum of 2*l.* had been paid to the plaintiff for the ship *Julius Cæsar* by the defendants. There were charges under different titles in the accounts between the defendants and Messrs. Goldsmith: such, for instance, as dunnage, but there was no general charge made for commission.

GASELEE, J., in summing up, said, I am still of opinion that the plaintiff has not made out his title to receive the difference between the sum paid him and that charged by the defendants to Messrs. Goldsmith. It does not follow that, because the defendants have charged Messrs. Goldsmith too much, therefore the plaintiff can recover it of them. As to the accounts, there is no charge for commission or for trouble; but there are a variety of charges, such as dunnage, &c. Therefore, it is quite clear, that

the contract between Messrs. Goldsmiths and the defendants, was not, that the latter were merely to charge the money out of pocket. I do not understand the effect of the evidence to be, that the defendants have actually received the money; but that will not make any difference. There is another question on the pleadings, whether the plaintiff has been properly paid by the defendants. You may give him, on the counts for work and labour, as much as you think he ought to have, provided there was no agreement for the sum actually received, and provided he has not by his acts shewn that he was satisfied with what had been paid him. There being no charge for the Wellesley under the head of stevedore, shews that the charges were of an *ad libitum* description.

1826.
WILSON
v.
COHEN.

The Jury found a verdict for the plaintiff.—
Damages, 13*l*.

Vaughan, Serjt., and *Platt*, for the plaintiff.

Wilde, Serjt., for the defendants.

[Attornies—*Warne & Son*, and *Cooté*.]

THE CITY OF LONDON GAS-LIGHT AND COKE COMPANY v. *June 26th.*
NICHOLLS and Another.

ASSUMPSIT for gas supplied at a place called Sun Wharf, of which the defendants were the occupiers. It appeared that the gas pipes had been appraised to the defendants, when they took possession of the wharf, and that they had paid at times for the repair of those pipes.

Taddy, Serjt., for the defence, contended, that there was nothing to fix the defendants as contracting with a public

The City of London Gas Light and Coke Company may maintain *assumpsit* for gas supplied to the occupiers of a wharf; and it is not necessary, in such a case, that there should have been any contract by deed executed by the Company.

Both of two partners are liable for gas furnished, if they have both had the use of it, although the lease of the wharf upon which it is supplied, is granted only to one of them.

1826.
 GAS-LIGHT
 COMPANY

v.
 NICHOLLS.

corporation. Unless both are bound, neither are so; and it requires something like a deed to bind a corporation.

BEST, C. J.—It is quite absurd to say, that there is any necessity for a contract by deed in such a case as this.

Campbell mentioned a case in the King's Bench, in which the Gas Company were sued as the acceptors of a bill of exchange.

Taddy, Serjt., then put in the lease of the wharf, which was only granted to one of the defendants, and contended upon this that it was wrong to sue both.

BEST, C. J.—It appears that the defendants have had the use of the gas; that the pipes were appraised to them, and that they have paid for the repair of them; and there is an implied undertaking on their part to pay for the gas.

Verdict for the plaintiffs.

Vaughan, Serjt., and *Comyn*, for the plaintiffs.

Taddy, Serjt., and *Manning*, for the defendants.

[Attornies—*T. N. Williams*, and *Boxer*.]

June 26th.

KEMPSON v. SAUNDERS.

A Company formed for the purpose of making a railway, one of the regulations of which was, that 15000 shares of 50*l.* each should be

raised, and then, that application should be made to Parliament, and which, after continuing for rather more than a year, was dissolved, because no eligible line of road could be found, is not an illegal Company, under the act 6 Geo. 1, c. 18, so as that a party, who has bought shares, may, on that account, recover back the money paid for them. But if the party who has sold shares has not complied with a regulation of the Company, stating that all transfers to be valid must be approved by a committee, so that the transfer to him was not a legal transfer, a person who has purchased of him may recover the money paid, on the ground that the consideration has failed, although he did not tender back the scrip receipts he received.

ASSUMPSIT to recover back a sum of money paid as the price of certain shares in the Bristol and Northern Rail-way Company. An auctioneer proved, that, on the 25th of December, he sold, by desire of the defendant, twenty shares at five guineas a share, that he received the

money on the 27th of December, which he paid to the defendant, and on the 4th of January he received the scrip receipts, which he handed over to the purchaser.

It appeared, that the Company was formed on the 13th of December, 1824; at which time certain resolutions were passed, one of which was, that books of subscriptions for raising fifteen thousand shares of 50*l.* each, should be opened at certain specified places, and that, as soon as convenient after that number had been taken, application should be made to Parliament. On the 24th January, 1825, a meeting of the original subscribers appointed a permanent committee, which, on the 19th May, 1826, dissolved the Company, because no eligible line of road could be found for carrying its plans into execution. It was one of the Company's regulations, that all transfers to be valid must be made with the approval of the committee; and no entry of any transfer of shares to the defendant appeared on the Company's books. The witness who proved these facts, stated that the scheme was *bona fide* in contemplation.

For the plaintiff it was contended, that, having paid his money for that which could not benefit him, he was entitled to recover it back. The cases of *Nockells v. Crosby* (a), and *Josephs v. Pebrer* (b), were cited; and it was also contended that the Company was illegal, under the stat. 6 Geo. 1, c. 118.

Vaughan, Serjt., for the defendant.—If the transaction was illegal, *potior est conditio defendentis*; and the Court will not assist the plaintiff.

(a) 5 Dow. & Ryl. 751. In that case it was held, that if the projectors of a scheme to be carried on by subscription, induce a number of persons to subscribe their money in the purchase of shares, and the scheme is abandoned before it comes into operation, the

subscribers are entitled to recover back, in an action for money had and received, the whole money subscribed, free from any deduction for expenses incurred in the formation of the plan.

(b) *Ante*, Vol. I. pp. 341, 507.

1826.
KEMPSON
v.
SAUNDERS.

1820.
 KEMPSON
 v.
 SAUNDERS.

BEST, C. J., was of opinion, that the Company was not an illegal one; but that as the defendant had not the confirmation of the committee to the transfer of shares made to him, he had nothing saleable; and therefore the plaintiff might recover back the money paid, on the ground that the consideration had failed.

Vaughan, Serjt., submitted, that the defendant should have tendered back the scrip receipts, which, it appeared, he had not done.

BEST, C. J., was of opinion, that that was not necessary.

Verdict for the plaintiff.—Damages, 105*l*.

Wilde, Serjt., and *Bompas*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Hicks & B.*, and *Vizard & B.*]

IN the ensuing Michaelmas Term, *Vaughan*, Serjt., moved for a new trial; but the Court refused a rule, considering the holding at Nisi Prius to be perfectly correct.

June 28th.

ATWOOD and Others v. GRIFFIN and Others.

If an accommodation bill be drawn payable to "bearer," and, after acceptance, the words, "or order," be added, the bill is not thereby vitiated; and it may be sued upon without having any fresh stamp.

ASSUMPSIT on a bill of exchange, drawn by Harry Cook, and accepted by the defendants for his accommodation, the plaintiffs were holders for a valuable consideration.

The bill was originally made payable to bearer, and, after acceptance, had been altered, by the addition of the words, "or order."

For the plaintiff, the cases of *Crutchley v. Clarence* (a), and *Crutchley v. Mann* (b), were relied on.

(a) 2 M. & S. 90.

(b) 5 Taun. 529, & 1 Marsh. 29.

The first of these cases was an ac-

tion against the drawer, and the other against the acceptor of a foreign bill of exchange, which was is-

Spankie, Serjt., for the defendants, contended, that the plaintiffs ought not to recover. The bill is not the same bill. It is no matter, whether an alteration of a bill increases or diminishes the liability. If it be made after the bill is perfectly issued, it will vitiate it. In this case, the party suing is not the party making the alteration. If the bill had not been altered, and there had been a count stating it to be payable to bearer, they must have recovered. There is a misdescription. The bill is stated in the declaration to have been originally drawn, payable to Groves, and accepted after that, and delivered after that; whereas the fact is the reverse. The alteration also was contrary to the stamp-act. In the *Crutchley* cases, the bill was not inland, and did not require any stamp.

1826.
 ATWOOD
 v.
 GRIFFIN.

Wilde, Serjt., for the plaintiff.—*Crutchley v. Clarence* decides this case. The decision there is on the general grounds; and no distinction is taken as to the counts. Mr. Justice *Bayley* says, “The issuing the bill in blank, “without the name of the payee, was an authority to a “*bona fide* holder to insert the name.”

BEST, C. J.—I am clearly of opinion that this was a bill payable to order. The case of *Crutchley v. Clarence* has, in my opinion, answered all the points, with the exception of the point on the statute; but I think the principle of that case applies itself to that point also. Lord *Ellenborough* says: “As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill.” And Mr. Justice *Bayley* says, that the issuing the bill with a blank for the payee’s name was an

sued with a blank for the name of the payee; and it was decided in both cases, that a *bona fide* holder might fill up the blank with his own

name. The first case was tried in the King’s Bench, and the other in the Common Pleas.

1826.
 ATWOOD
 v.
 GRIFFIN.

authority to a *bona fide* holder to insert the name. If so, then the plaintiff had a similar authority in this case. I think there is no necessity for a new stamp, for there is no new contract made; it is only the perfecting of the imperfect contract. It is similar in principle to the case of a man's limiting the negotiability of a bill, by indorsement to a particular person.

Verdict for the plaintiff.

Wilde, Serjt., and *F. Pollock*, for the plaintiff.

Spankie, Serjt., for the defendant.

[Attornies—*G. Holmer*, and *Vandergucht*.]

June 30th.

If an agreement be entered into for the employment of a clerk for four years from the 1st of January, 1823, at a salary of 400*l.* a-year, and the salary be paid up to the 1st of January, 1825, and in July, 1825, the clerk is dismissed from his employment, he may commence an action in Michaelmas Term, 1825, though at that time, according to the agreement, a year's salary would not be due.

PAGANI v. GANDOLFI.

THE declaration (which was of Michaelmas Term, 6 Geo. 4) was on an agreement between the plaintiff and defendant for the employment of the plaintiff by the defendant as a clerk for four years, from 1st January, 1823, at 400*l.* a-year. It appeared, that there were accounts between the plaintiff and defendant, on which, in the month of February, 1825, the plaintiff had paid to the defendant a sum of 85*l.* as a balance due to him.

The plaintiff was dismissed from his employment in the month of July, 1825, for alleged misconduct.

Taddy, Serjt. applied for a nonsuit, and contended, that as by the agreement, the payments were to be made from the 1st of January, 1823; and the salary was a yearly salary; and as it appeared from the accounts that the salary must have been received up to the 1st of January, 1825, the action being brought in Michaelmas Term, 1825, was commenced too soon, because a whole year's salary would not be due till the month of January, 1826.

BEST, C. J.—But, it seems, you have dismissed the plaintiff from his employment.

1826.
PAGANI
v.
GANDOLFI.

Wightman.—If the dismissal was wrongful, then he may be entitled to salary; but the salary is not yet due.

BEST, C. J.—I think he was not bound to wait till the end of the year, if you dismissed him previously. The jury may infer from the account put in, that payments were made from time to time: and indeed his necessities would require it. I am of opinion, that there is no foundation for the objection.

The defendant afterwards had a verdict, upon the ground that the dismissal was proper.

Wilde and *Adams*, Serjts., and *Platt*, for the plaintiff.

Taddy, Serjt., and *Wightman*, for the defendant.

[Attornies—*Knight & F.*, and *Webster & Son*.]



THE SOUTHWARK BRIDGE COMPANY v. SILLS, RAMSAY & SILLS.

June 30th.

ASSUMPSIT for the use and occupation of certain arches under the Southwark Bridge, near to Three Cranes Wharf, of which the defendants were alleged to be the occupiers. The contract was contained in a series of letters.

The Southwark Bridge Company may maintain *assumpsit* for the use and occupation of premises held under them.

A covenant to produce deeds, purporting to be between the three defendants, (describing them as wharfingers) of the one part, and ————— of the other part, and of which the execution by Mr. Ramsay was proved, was given in evidence to shew the partnership of the defendants;

1826.
 SOUTHWARK
 BRIDGE CO.
 v.
 SILLS.

and a witness stated, that he thought he had seen the names of the three defendants upon the carts used at Three Cranes Wharf; but he could not speak positively upon the subject.

Adams, Serjt., objected, that this evidence was not sufficient.

BEST, C. J., was of opinion that it was.

Adams, Serjt., then objected, that, as a corporation can only demise by deed; and as the contract in this case was not by deed, the plaintiffs were not entitled to recover.

BEST, C. J.—I agree with you, that, if it be necessary to proceed upon a demise in the case of a corporation, it must be by deed; but in this case there has been use and occupation, for which I am of opinion that the defendants are bound to pay.

Verdict for the plaintiffs.

Vaughan and *Wilde*, Serjts., and *D. Pollock*, for the plaintiffs.

Adams, Serjt., and *Dubois*, for the defendants.

[Attornies—*Nettleship*, and *Tyrrell & Sons*.]

July 1st.

HEWITT v. THOMPSON.

In an action on a bill of exchange by the second indorsee against the drawer, the first indorsee is a competent witness for the plaintiff.

ASSUMPSIT on a bill of exchange by the second indorsee against the drawer.

The first indorsee was called as a witness for the plaintiff, and his testimony was objected to.

On the part of the plaintiff, it was contended, that his evidence was admissible, on the authority of *Shuttleworth*

v. Stevens (a), *Richardson v. Allan* (b), *Jordaine v. Lashbrook* (c), and *Bayley on Bills* (d).

1826.

HEWITT

v.

THOMPSON.

Wilde, Serjt., for the defendant. — In Mr. *Chitty's* book, it is said, that the case of *Shuttleworth v. Stevens* has been overruled (e).

BEST, C. J. — I will allow the witness to be examined, and give my brother *Wilde* leave to move.

The plaintiff was afterwards nonsuited.

Spankie, Serjt., and *Moody*, for the plaintiff.

Wilde, Serjt., for the defendants.

[Attornies—*T. West* and *Baddeley*.]

(a) 1 Camp. 407.

(b) 2 Starkie, 334.

(c) 7 T. R. 601.—In this case, the payee and indorser was held to be a competent witness for the defendant, in an action by indorsee against acceptor. In the case of *Shuttleworth v. Stevens*, the indorser was held to be a competent witness for the plaintiff in an action by indorsee against drawer, to prove that he indorsed it to the plaintiff for valuable consideration. And in the case of *Richardson v. Allan*, the indorser was called to prove his own indorsement, when another witness had said it was not his.

(d) 4th. Edit. p. 422.—Where his Lordship lays down, that, in actions by indorsee against drawer or acceptor, the indorser is in general a competent witness either for the plaintiff or the defendant.

(e) The learned author, at p.

415, considers the case of *Shuttleworth v. Stevens* as overruled by the cases of *Jones v. Brooks*, 4 Taunt. 464, and *Hardwick v. Blanchard*, Gow, N. P. C. 113. In the former, it was held, that in an action by indorsee against acceptor, if the defence be, that the bill was an accommodation-bill, the wife of the drawer is not a competent witness to prove that it was so; because the drawer of an accommodation-bill is bound to indemnify the acceptor against the consequences of such a bill. In the case of *Hardwick v. Blanchard*, Gow, N. P. C. 113, it was held, that in an action by indorsee against acceptor of an accommodation-bill, the drawer was not a competent witness to prove that the plaintiff, who had discounted the bill, had received usurious interest. However, in neither of these cases is that of *Shuttleworth v. Stevens* expressly mentioned.

1826.

July 1st.

FISHER v. ALGAR & KETTLE.

A lodger may maintain an action, if his goods are taken on an excessive distress by the landlord of the party under whom he occupies.

The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which those of his tenant.

CASE for an excessive distress, and also for not selling within the proper time.

The plaintiff was a lodger in the house of a person named Dodd, who was tenant to the defendant Kettle. The defendant Algar, who was a broker, distrained on Dodd for rent due to Kettle, and among other goods took the plaintiff's. The wife of Dodd was called as a witness; who stated, that a sum of 20*l.* only was due, (29*l.* being the sum distrained for), and that there were goods enough to pay the 20*l.* without touching those of the plaintiff. The goods remained a month upon the premises, at the request of Mrs. Dodd, before they were removed. The plaintiff was compelled to pay 15*l.*, the sum at which his goods were valued, before he could get them back.

The defendant's counsel contended, that, although the excess in the distress might be a good ground of complaint by the tenant Dodd, yet that it was no objection in the mouth of the plaintiff, who was his lodger.

BEST, C. J. — I am of opinion, that if a lodger's goods are taken on an improper distress, he may maintain an action.

It was then proved, in contradiction to the evidence of Mrs. Dodd, that the sum of 29*l.*, for which the distress had been made, was all of it due.

Wilde, Serjt., then relied on the fact of the landlord not having sold the goods at the proper time.

BEST, C. J. — That was in consequence of Mrs. Dodd's request.

Wilde, Serjt.—I apprehend that she cannot bind us.

BEST, C. J.—I think that if the party distraining did not know which were the lodger's goods, the request of Mrs. Dodd would justify the detention. I think it would be dangerous, on such evidence as this, to find a verdict for the plaintiff, in this species of action. The evidence ought to be extremely clear. Fisher must seek his remedy over against Mr. Dodd.

1826.
FISHER
v.
ALGAR.

Verdict for the defendants.

Wilde, Serjt., and *Steer*, for the plaintiff.

Taddy, Serjt., for the defendant Algar.

Spankie, Serjt., and *Thesiger*, for the defendant Kettle.

[Attornies—*Fisher & G.* and *Scarth.*]

LOADER v. KEMP.

COVENANT on an indenture, dated the 8th of November, 1813, by which the defendant demised certain premises to the plaintiff, in consideration of a sum of 200*l.* and in which he (the defendant) covenanted to rebuild them, if they should be destroyed by fire.

It appeared, that the plaintiff, after the lease was granted, erected a third story, the premises, at the time of the demise, consisting only of two. The premises had been burnt down; and the question was, Whether the landlord was bound to restore them to the state in which they were after the third story had been added.

The words of the covenant were, as follow:—"And also that he (the said lessor), shall and will, in case the said messuage or tenement, shop and buildings hereby demised, or any part thereof, be burnt down or damaged by fire, as soon as may be, at his own costs and charges, *rebuild and*

July 1st.

If a lessor covenant in a lease with his lessee, that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and not to rebuild any *additional* parts which may have been erected by his tenant.

1826.
 {
 LOADER
 v.
 KEMP.

replace the same in the sawe state as they were in before the happening of such fire."

BEST, C. J. — It appears to me, that the landlord is only to rebuild what he let; for a landlord would be in a desperate situation, if he were bound to rebuild every thing which his tenant may think proper to set up. He might be ruined in many cases.

The case was referred to Mr. Bingham, to ascertain all the facts, for the purpose of raising the point for the opinion of the Court above.

Vaughan and *Lawes*, Serjts., and *Campbell*, for the plaintiff.

Wilde, Serjt., and *D. Pollock*, for the defendant.

[Attornies—*Collins*, and *Lovell*.]

July 3rd.

BIRÉ v. MOREAU.

If an action is brought on a bill of exchange not having any English stamp, and purporting to be drawn at Paris, the defendant will be entitled to a verdict, if it appear from the evidence that the plaintiff must have been in England on the day on which it purports to have been drawn. But it will be sufficient to enable the plaintiff to recover, if the bill was drawn at a place in France nearer to England than Paris, though it be dated as from Paris.

ASSUMPSIT on a bill of exchange drawn by Pettit, and accepted by the defendant, indorsed by Pettit to Galway, and by Galway to the plaintiff. The bill was in French, and apparently had a French stamp, but no English one, and purported to have been drawn at Paris on the 15th October, 1824.

After the formal proof for the plaintiff, a witness was called for the defendant, who stated, that he saw Pettit, the drawer, on the 8th of October, in London; that he thought he saw him every other day during that month, and that he had no doubt that he saw him so near the 15th, that he could not have got to Paris upon that day. A lady, who lodged in the same house with Pettit, proved, that for two months previous to the beginning of November, she dined

in his company every day, with the exception of a few days, (not consecutive), when she dined out.

1826.

BIRE

v.
MOREAU.

Taddy, Serjt., for the plaintiff. — It does not lie in the mouth of the acceptor of a bill of exchange to set up this defence. The defendant has accepted this bill as drawn in Paris, and has given it credit as such. It apparently has a French stamp. The evidence to contradict the presumption of its having been drawn in Paris, ought to be of the most complete and convincing description.

Hutchinson, also, for the plaintiff, cited *Abraham v. Dubois* (a).

BEST, C. J., in summing up, observed—If you are quite satisfied that the bill was drawn in England, then the defendant is entitled to a verdict. But if it is possible for the drawer to have been absent, so as to have drawn it out of England, in that case the plaintiff ought to have a verdict: if the drawer got to Calais, and drew the bill there, and dated it as from Paris, I think that will do. The question is, are you quite satisfied that the bill was drawn in this country: if you are, you will find a verdict for the defendant; for then it is a fraud upon the revenue of this country, which either party may take advantage of.

Verdict for the defendant.

Taddy, Serjt., and *Hutchinson*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Tottie & Co.*, and *Hubert*.]

(a) 4 Camp. 269. This was an action on a bill of exchange, dated Paris, March 1st. The defence was, that it had been drawn in London, and was void for want of a stamp. The proof given was, that the drawer was in London on the third of March, at 11 o'clock in the forenoon. Lord *Ellenborough* said,

that as the drawing a bill in England, purporting to be drawn abroad, for the purpose of evading the stamp-duties, was a very serious offence, the fact must be made out by distinct evidence. His Lordship ruled, that the evidence given was not sufficient; and the plaintiff had a verdict.

1826.

July 4th.

If an engineer is employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense of the works, he is bound to ascertain for himself, by experiments, the nature of the soil; although a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result.

If an engineer, employed as above, makes a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it; and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at a much greater expense, he is not entitled to recover any thing for his trouble in making such estimate.

MONEYPENNY *v.* HARTLAND and Another.

ISSUE to try whether the plaintiff was entitled to any and what sum, for work and labour as an architect and engineer. The defendants were restrained by an order of the Vice Chancellor, from setting up partnership as a defence. The plaintiff was employed by the defendants, who were the trustees appointed by the subscribers to the undertaking, to make an estimate of the expense of erecting a bridge over the Severn, and making a road thereto. It appeared that a person named Holland was employed by the committee, previous to the employment of the plaintiff, to ascertain by boring the nature of the soil, and that he informed the plaintiff of the result of his experiments, and that the plaintiff acted upon that information, in making his estimate, and did not make any experiments himself. Holland reported the soil to be of hard marl rock. The plaintiff laid the foundations of the bridge, about forty yards distant from the spot marked out in his plan, for the sake of a more convenient turn into the town of Tewkesbury; and it was found, after the work was begun, that the soil at that part being of clay, required piling and planking, which created an expense of 1400*l.* in addition to the sum mentioned in the estimate. The expense of making the road was estimated at 1700*l.* but, in point of fact, it cost 3,300*l.* in addition to that sum. The estimates were made in November, 1822; the work was begun in June, 1823. On the 1st of September, 1823, the plaintiff, for the first time, examined the foundation, and discovered that, from the nature of the soil of the river, piling and planking would be required. In the month of February, 1824, the plaintiff was dismissed from his employment, and Mr. Telford engaged in his stead. The plaintiff had attended at the House of Commons while the bill was in progress; and several surveyors proved that the usual charge for such attendance, was five guineas *per* day.

Taddy, Serjt., for the defendants.—Inasmuch as the defendants relied on the plaintiff's skill, as to the propriety of the situation, and the expense of the work; he ought not to have been satisfied with the information given him by Mr. Holland, but should have made experiments to ascertain the facts for himself. Though Holland might be directed to give the plaintiff information, the plaintiff was not thereby released by the committee from the necessity of making further inquiries. It was to raise the amount mentioned in the estimate, and that amount only, that the subscriptions were made. If the plaintiff's report was wanted in a hurry, he might have made it, with a reservation of the particular point, as to the nature of the soil. He cited *Money Penny v. Hartland* (a).

1826.
 MONEY-
 PENNY
 v.
 HARTLAND.

Mr. Telford was examined on the part of the defendants, and stated, that it was the duty of an architect or engineer to examine for himself into the nature of the soil; and that he ought to consider himself responsible for it, though another person had given him information on the subject.

A road-surveyor was also called, who stated, that he had estimated the expense of making the road from the Mythe to the Hollybush-Hill (the road in question) at the sum of 5,150*l.*, and that it could not possibly be made for the sum of 1700*l.*, which was the amount of the plaintiff's estimate.

It was also proved, that the plaintiff had put down his name for some shares in the concern, in the following form:—"George Money Penny, as Architect and Surveyor to the Bridge and Roads, 500*l.*;" and it was admitted that this sum had been demanded in the month of May, 1824.

All the witnesses, both for the plaintiff and defendant, agreed as to the plaintiff's due and diligent attendance at the House of Commons.

Vaughan, Serjt., for the plaintiff.—If complaint be

(a) *Ante*, Vol. 1, p. 352.

1826.
 MONEY-
 PENNY
 v.
 HARTLAND.

made against a party employed, the first question is, has the party employing derived any benefit from his services; if so, he must pay for them, and seek his remedy by a cross action. Supposing an action had been brought by the defendants against the plaintiff for the omission of the planking and piling, what would they have made of it? He has not been guilty of negligence as to them. Holland says, that he was employed by the Committee before the plaintiff came, and made all the preliminary arrangements, and reported the result several times. It would have been officious and unnecessary for the plaintiff, after that, to have undertaken the boring himself. An estimate must be taken, to mean, that the expense will be there or thereabout. If it were followed up by a contract, then it might be different. The plaintiff was relieved from the necessity of any particular examination of the soil by the conduct of the trustees and their confidential surveyor, Holland, who turned out to be mistaken. The foundations were laid with parade and ceremony either in August or September, 1823, and complaint was not made till the month of February, 1824. The delay shews that the objection was an afterthought. The plaintiff's witnesses say, that there are often contingencies in a work; and there is in the plaintiff's estimate an item of 2000*l.* for contingencies. They have not sustained any damage in consequence of the plaintiff's not having bored. With respect to the subscription, it was done to shew his good opinion of the undertaking.

BEST, C. J.—The first question will be, whether the plaintiff is entitled to any compensation; and if he is, then, whether it will extend beyond the 500*l.*; for I am clearly of opinion that he is answerable for the subscription. With respect to the first question, the cases appear to be conflicting; and there is some difficulty. I shall take the liberty of laying down this rule. Supposing negligence or want of skill to be sufficiently made out, unless

that negligence or want of skill has been to an extent that has rendered the work useless to the defendants, they must pay him, and seek their remedy in a cross action. For if it were not so, a man, by a small error, might deprive himself of his whole remuneration. It appears, that Mr. Telford adopted a part of the plaintiff's plan; and up to that extent the defendants have been benefited. I grant, that it is not a trifling deviation from an estimate, that is to prevent a party's recovering. But if a surveyor delivers in an estimate, greatly below the sum at which a work can be done, and thereby induces a private person to undertake what he would not otherwise do; then I think he is not entitled to recover: and this doctrine is precisely applicable to public works. There are many in this metropolis which would never have been undertaken at all, had it not been for the absurd estimates of surveyors. I think, if it was so in the present case, the plaintiff is not entitled to recover. And it appears from the case cited, that my Lord Chief Justice *Abbott* was of the same opinion. His Lordship says, "I think it of great importance to the public, that gentlemen in the situation of the plaintiff should know, that if they make estimates, and do not use all reasonable care to make themselves informed, they are not entitled to recover any thing." And to this I am disposed to add a qualification, which is found in my brother *Bayley's* opinion. His words are, "*The plaintiff claims as much as his services are worth; and if he led his employers into a great expense by his want of care, his services would be worth nothing.*" If you think the lowness of the estimate in this case induced the parties to undertake the work, then you should find your verdict for the defendants. It is said to-day, that there is a difference between an estimate and a contract. I do not agree in that observation: between honest men there is no difference at all. A man should not estimate a work at a price at which he would not contract for it; for if he does, he deceives his employer. It appears, that 1400*l.* in addition to the esti-

1826.
 MONEY-
 PENNY
 v.
 HARTLAND.

1826.
 MONEY-
 PENNY
 v.
 HARTLAND.

mate, was required for planking and piling, and 3,300*l.* in addition to the 1700*l.* for the completion of the road. Is a man to tell me that a thing can be done for 1700*l.* which cannot be completed for less than 5000*l.*? But it is said, there has been no negligence here, because the plaintiff had been informed by another of the state of the soil. In my opinion, he should not have trusted to such information. But I do not act upon my own opinion alone; for I find the opinion of Mr. Telford is the same. But, it seems, the plaintiff did not, in fact, act upon the information; for he built the bridge forty yards distant from the spot where he was told the marl rock had been found. However great the plaintiff's skill, it seems to me impossible to say, that he has conducted himself properly in this case. With respect to the road, were not the trustees to understand, that for the sum mentioned in the estimate it was to be done to their satisfaction, and that of the public? You will ask yourselves these two questions:—1st, Is there not great want of skill, or great want of attention? 2ndly, Do you think these defendants would have engaged in this scheme if they had been truly informed upon the subject? If you doubt, incline against the plaintiff. I do not think the charges proved to be customary by the surveyors, who have been called, are at all improper, when I consider the great skill and talent which these gentlemen must bring to bear upon the questions submitted to their judgment.

The jury found for the plaintiff, damages 750*l.* saying, that they held the plaintiff liable to pay his subscription of 500*l.*, if the subscribers paid their proportions.

Vaughan and *Wilde*, Serjts., and *Campbell*, for the plaintiff.

Taddy, Serjt., and *Patteson*, for the defendants.

[Attornies—*Hurd & J.*, and *Jenkins & Co.*]

In the ensuing Michaelmas Term, a rule nisi was obtained for reducing the damages to 250*l.*, which was not argued, as the plaintiff consented to take his verdict for that sum.

1826.
MONEY-
PENNY
v.
HARTLAND.

If the surveyor to an undertaking of this sort is a shareholder in the work, he cannot recover his charges in an action. *Holmes v.*

Higgins, 2 Dow. & Ry. 196, a short abstract of which will be found, *ante*, Vol. I. p. 353, n. (a), but must proceed in equity.

• WELLS v. HORTON, Executor of BLISSETT.

July 5th.

ASSUMPSIT. The first five counts were on promises by the testator for money lent, money paid, &c. The sixth count stated, that the testator, in his life-time, on the 1st of January, 1808, was indebted to Mary, the wife of the plaintiff, then being sole and unmarried, for money lent and forborne; and the said money remaining unpaid, the said testator in his life-time afterwards, and after inter-marriage of said plaintiff and the said Mary, on the 1st of January, 1816, in consideration that the said plaintiff would forbear to proceed against him for the recovery of the money during his life-time, undertook and promised the said plaintiff that his executor should, after his decease, as such executor, pay to the said plaintiff the said sum of money. It then averred, that the plaintiff did forbear to proceed against the testator, and that assets came to the hands of the defendant more than sufficient to pay debts, legacies, &c. The seventh count was similar to the sixth, except that it contained no averment either of forbearance or of assets. The eighth count was on an account stated between the plaintiff and defendant. The pleas were the general issue, and the statute of limitations.

A person borrowed a sum of money in the year 1807. In the year 1815, he stated, by parol, to the attorney of the party entitled to it, that he had made provision by his will, and had directed his executors to pay it at his death. He died in the year 1825, without having made any such provision.— Held, in an action against the executor, that the promise was good, and the money recoverable; that neither the statute of frauds nor the statute of limitations applied to the case; and that a moral obligation to pay was a sufficient consideration for the promise.

A clerk in the bank proved, that in the stock ledger, in the year 1807, there was a sum of 3108*l.* 9*s.* 7*d.* standing in the name of Mary Blissett (who was the daughter of the testator); and that sum was transferred to the testator by a power of attorney given to him on the 2nd of October

1826.
WELLS
v.
HORTON.

in that year. Mary Blissett was married to the plaintiff in October 1812.

Mr. Montriou, an attorney, was then called as a witness. He stated, that on the 13th June, 1815, he had an interview with the testator, at the request of the plaintiff. He told him, that the plaintiff and his wife wished to make a settlement of Mrs. Wells's share of the residuary estate of Mr. Tibbs, preparatory to which they were desirous of coming to some arrangement with him as to the payment of that part of it which had been lent to him. The testator said, they were aware he could not return the money in his life-time; that he had made several proposals to the plaintiff about it, to which, if he did not think proper to accede, or if he inconveniently pressed him for payment, he should erase his and his daughter's name out of his will altogether. The witness replied, that it was not the plaintiff's intention to press him inconveniently, but he wished that some arrangement might be made. The testator said, that he had made provision by his will, and had directed his executors to pay the money, meaning the specific sum; and he thought that the best security which the plaintiff could have. The witness observed, that a will was always revokable, and that it was hardly to be expected that the plaintiff should rely upon it, and suggested the giving a bond or a promissory note, to which the testator objected. The witness then proposed a letter, stating what his intentions were. The testator said, that he would not subscribe any writing; that the plaintiff knew well his intention towards his daughter, and that if he was not satisfied with the repayment at his death, he might take his own course. The witness said, he would relate what had passed to the plaintiff, but could not say whether he would agree to it or not. The witness did communicate it to the plaintiff, for whom he was, at the time, professionally concerned; and he was not instructed to take any steps against the testator: but he stated that he could not say, whether the forbearance was particularly upon the faith of the testator's promise. On his cross-ex-

amination, he said, that the plaintiff and his wife were separated, and that the plaintiff was a sugar-broker, and in the year 1824 stopt payment, and paid 2s. 6d. in the pound.

1826.
WELLS
v.
HORTON.

The will of the testator, proved the 2d of January, 1826, was read. It appointed the defendant sole executor. It gave a sum of 100*l.* a-year to the testator's wife, 50*l.* a-year for the maintenance of a natural son, and 50*l.* a-year for the maintenance of a natural daughter. It then gave an annuity of 100*l.* a-year to the plaintiff's wife for life, to be paid half-yearly, separate and apart from the control of any husband. This annuity, after her death, was to go to his granddaughter, Rose Wells, and after her decease was to form part of the residuary estate. The residuary estate was given to the testator's son and daughter; and if they should die before the age of twenty-one, then it was to go to his next of kin living at the death of the survivor of such son and daughter. The property was sworn under 18,000*l.*

Onslow, Serjt., for the defendant.—As to the special counts, the plaintiff ought to be nonsuited, as the promise proved by the witness was not such as to support what is laid in them. And, with respect to the money-counts, the statute of limitations puts them out of the question.

BEST, C. J.—I think that the seventh count is proved.

Onslow, Serjt.—Does not your Lordship think that the statute of limitations applies to that count?

BEST, C. J.—I think not, as the undertaking was to do something on a certain event, which event has occurred within the six years.

Onslow, Serjt., then submitted, that the statute of frauds was applicable to the case, and the promise ought to have been made in writing.

1826.
 WELLS
 v.
 HORTON.

BEST, C. J.—I think the contingency might have happened within the year; and that will bring it within the case mentioned in Selwyn about the ship's coming back (a). I myself think, that a judge at Nisi Prius is not warranted in going against the decision of a Court. I act upon the decision, but will give you leave to move the Court upon the subject.

Onslow, Serjt.—There is no consideration to support this special promise.

BEST, C. J.—I think there is plenty of consideration. There was a moral obligation to pay; and I hope that the judges in Westminster Hall will always hold, that a moral obligation to pay is a sufficient consideration for a promise to pay.

Onslow, Serjt.—The words of the promise proved, are, that he *had* made provision, and *had* directed his executors to pay. This is in the past tense, and the declaration is in the future.

BEST, C. J., in summing up, said—If you think the plaintiff was induced to forego his claim in consequence of

(a) *Anonymous*, Pas. 5 W. & M. C. B. Salkeld, 280. A parol promise was made to pay a sum of money on the return of a certain ship. The ship did not return till two years after the promise. All the Judges held, that the promise was good, and not within the statute of frauds, saying, that it only extended to such promises, where, *by the express appointment of the party*, the thing was not to be performed within a year, and that, by possibility, the return of the ship might have been within

the year, though, by accident, it happened to have been delayed beyond it. This case was cited and approved by Mr. Justice Wilmot, in a case of *Fenton v. Embalers*, executor of *May*, reported in 3 Burr. 1278. In that case, the Court of King's Bench held, that the statute did not apply to a parol promise by a master to pay yearly wages to a servant, and also by his last will and testament to give and bequeath to such servant a legacy or annuity of 16*l.* a-year for life.

his expecting a legacy, though he is disappointed in his expectation, yet he cannot recover. I am of opinion, that the words, "I have made provision," used by the testator, are sufficient to satisfy the count in the declaration. If you think the testator made the specific promise, then the plaintiff is entitled to a verdict. If he merely promised to make provision generally, but not with a reference to the specific sum, though the provision was not sufficient, yet the plaintiff cannot recover.

Verdict for the plaintiff.

Bosanquet, Serjt., and Holroyd, for the plaintiff.

Onslow and Spankie, Serjts., for the defendant.

[Attornies—*Baxendals, T. & U., and Warrs.*]

IN the ensuing Michaelmas Term, a rule *nisi* was obtained, pursuant to the leave given, which was discharged after argument.

DEAN and Others v. M'GHIE and Another.

Oct. 28th.

ASSUMPSIT. The plaintiffs were the assignees of a bankrupt named Prince, and the defendants were the brokers of a person named Chance. The action was brought to recover a sum of money, which had been paid to the defendants as the freight of a ship called the *Rosalind*.

A clerk from the Custom House produced the books kept there, relating to the ownership of vessels, from which it appeared, that on the 29th of December, 1824, the bankrupt, Prince, was the owner of the *Rosalind*; and he proved, that on the 3d of March, 1826, an indorsement was made on the register of a transfer from Prince to Chance of the whole of the ship, by a bill of sale by way of mortgage, dated the 16th of November, 1825. The indorsement was not made earlier, because the ship was away on a voyage; but the witness stated, that the bill of sale was shewn to him on the 25th of November, 1825. Prince

If the brokers to a mortgagee of a ship, who has taken possession, receive the freight, it is not recoverable from them in an action of *assumpsit* by the assignees of the mortgagor (he having become bankrupt), if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages.

1826.
WELLS
v.
HEATON.

1826.
 DEAN
 v.
 M'GHEE.

became bankrupt on the 4th of February, 1826. The freight was paid to the defendants in the months of March and June, 1826, and they paid it over to their principal, Chance, by whom they were indemnified, but not till after they had received notice not to do so from the plaintiffs. The right of the plaintiffs to sue as assignees was admitted.

For the plaintiffs, it was contended, that they were entitled to recover; because Prince, whom they represented, continued to be owner of the ship, notwithstanding the mortgage, and as such was entitled to the freight. The 4 Geo. 4. c. 41, s. 43, was referred to (a).

For the defendants, it was contended, that the statute referred to had no operation in the case of a mortgagee *in possession*; and also, on the authority of the case of *Dixon v. Hamond* (b), that, being the agents of Chance, they could

(a) That section enacts as follows:—"That when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any

other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise, for the payment of the debt or debts, for securing the payment of which such transfer shall have been made."

(b) 2 B. & A. 310. It was there held, that an agent cannot dispute the title of his principal; and,

not dispute his title, but were bound to pay over to him the money they received.

The bill of sale, by way of mortgage, dated 16th November, 1825, was then offered in evidence. It had no stamp, and therefore was objected to. To answer this objection, the stat. 6 Geo. 4, c. 41, s. 1, was referred to (a).

1826.
DEAN
v.
M'GHEE.

BEST, C. J., was of opinion, that the transfer was good.

It was then stated, that the bill of sale contained, in addition to the assignment of the ship, an assignment of a policy of insurance; it was contended, that as such assignment was not mentioned in the statute which had been referred to, the instrument was not valid unless it were stamped.

BEST, C. J.—I am of opinion, that that circumstance only makes it void *pro tanto*.

The bill of sale was then read. It was for a loan of 8000*l*. The day for redemption was the 16th of January, 1826. Proof was then given, that, on the 26th of January, 1826,

therefore where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, *as agent for both partners*, insured the ship and freight, and charged them with the premiums, &c., and on a loss happening, received the money from the underwriters:—Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged.

(a) That section enacts as follows:—"That from and after the

passing of this act, [10th June, 1825,] all stamp duties now payable in Great Britain and Ireland respectively, upon or in respect of any bill of sale, or any conveyance, assignment, or other deed or instrument whatever, for the sale, transfer, or other disposition, either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel, shall wholly cease, determine, and be no longer paid or payable; any thing in any act or acts of parliament contained to the contrary thereof in anywise notwithstanding."

1886.
 DEAN
 v.
 M'GHEE.

a person took the command of the ship, by order of the defendants, on behalf of Chance, when she was on her homeward voyage, at a place called the Lower Hope, a few miles below Gravesend; and also that nearly double the amount sought to be recovered by the plaintiffs had been expended in the payment of the wages of the seamen.

BEST, C. J., upon this, observed to the plaintiff's counsel—As this is an action for money had and received, can you recover?

Plaintiff's Counsel.—They are not at liberty to throw all this upon the freight?

BEST, C. J.—The action of *assumpsit* is an equitable action; and my Lord *Mansfield* said, that, in *assumpsit*, you can recover nothing but what you are entitled to receive in equity. You were liable to pay these things; and the defendants have paid them for you; therefore, you cannot recover the money from them. I am of opinion, that the plaintiff must be called.

Nonsuit.

Bosanquet and *Taddy*, Serjts., and *Evans*, for the plaintiffs.

Wilde, and *Adams*, Serjts., for the defendants.

[Attornies—*Kearsey & S.*, and *Bell & B.*]

IN the ensuing Michaelmas Term, a rule nisi for setting aside the nonsuit was obtained, which was discharged after argument.

1826.

KING v. BUTTERWORTH and Another.

Oct. 31st.

[Special Jury.]

TRESPASS for breaking and entering the dwelling-house of the plaintiff, situate in a certain place called Serjeant's Inn, in Fleet-street, and taking away his goods and chattels. Plea—Not guilty (a).

The occupiers of houses in Serjeant's Inn, Fleet-street, are not liable to pay poor's rates to the parish of St. Dunstan in the West.

It was admitted, that the defendants were overseers of the parish of St. Dunstan in the West; that they entered the plaintiff's house, which was numbered 11 in, and always formed a part of, Serjeant's Inn; that they took the goods of the plaintiff as a distress for poor's rates claimed by the parish; that the plaintiff was the occupier of the house in question; and that the rate had been both properly made and demanded; and also, that the *locus* was within the city of London.

The question was, whether Serjeant's Inn, Fleet-street, formed a part of the parish of St. Dunstan, and as such was liable to the payment of poor's rates. This was the first time that the claim had been made, and the absence of any previous demand was relied on by the plaintiff as sufficient to call on the defendants to make out their case.

Wilde, Serjt., for the defendants, then argued as follows:—In former times opinions and prejudices, not well founded, led to the neglect or omission on the part of parishes of calling upon some persons to pay rates, who, in point of law, ought to have been so called on. That has been the case in the present instance. About the fourteenth century, a man named Dalby bequeathed a

(a) By the statute 43 Eliz. c. 2, s. 19, it is enacted, that if any action of trespass or other suit shall happen to be attempted and brought against any person for

taking of any distress, &c., by authority of that act, the defendant may either plead not guilty, or justify, &c.

1826.
KING
v.
BUTTER-
WORTH.

sum of money to the Dean and Chapter of York, for the purpose of founding a chauntry, in which masses might be said for the repose of his soul. With this money, the dean and chapter purchased a house in St. Dunstan's in the West, standing on the present site of Serjeant's Inn. It formed no part of a monastery, nor was it subject to any peculiar jurisdiction. It remained in the hands of the dean and chapter till the Reformation, when it was supposed to have escheated to the crown as property devoted to superstitious uses; and in consequence, in the reign of Edward the Sixth, it was seized into the hands of the crown, and some short time after sold to Lord Chief Justice Montague. Previously to the purchase by the Dean and Chapter of York, an inquiry, by writ of *ad quod damnum*, was made in the ninth year of Henry the Fourth, (1408), which was followed in 1409 by a license to hold in mortmain. Both these documents describe the property as situate in the parish of St. Dunstan. The grant to Lord Chief Justice Montague, as well as a particular made out previous to such grant, in the third year of Edward the Sixth, mention a messuage-house and hereditaments, commonly called Serjeant's Inn, in the occupation of the judges under a lease for years, and certain other houses and shops in Fleet-street, in the possession of other persons, but describe them all as in the parish of St. Dunstan, and identify the property, by adding, "commonly called, Dalby's chauntry." These houses and shops in Fleet-street, being occupied by tradesmen, have been rated for many years. The messuage called Serjeant's Inn continued to be occupied by Lord Chief Justice Montague, and the other judges, for a considerable time; and the whole property is described in the will of the Lord Chief Justice as being within the parish, no distinction being made between the large house and the shops, &c. in the occupation of the tradesmen. Some time after this, it was conceived, that the property had never legally vested in the crown, and an action of ejectment was

brought by a person named Holloway, a tenant of one of the shops in Fleet-street, to try the right (a). The venue

(a) The case is reported as follows in Croke James, p. 51.—“*Holloway v. Watkins. Ejecutione firmæ*, for a house adjoining to Serjeant's Inn in Fleet-street, and depending upon the same title. Upon a special verdict, the case was—The Dean and Chapter of York had devised unto them, by one Dalby, 400*l.*, to the intent to find a chantery in their church perpetually, and an *obit* for the soul of Dalby, and that the chantery priest should have 48 marks yearly, &c. King Henry the Fourth granted licence unto them to purchase those houses in Fleet-street and other land in York, *ad onera et opera pictatis*, in the will of Dalby mentioned to be performed; whereupon they purchased this land, and made ordinances how that priest should be maintained, and agreed with the executors of Dalby for the finding him perpetually; and they confess the receipt of that 400*l.* devised to them, and obliged themselves *ac omnia bona sua ad performandum*, &c. And it was found, that the dean and chapter employed 8*l.* for the maintenance of a priest, and other sums for the maintenance of an *obit*, and that those lands were, in *primo Edw. 6*, certified to be employed for a chantery; and the stat. of *primo Edw. 6*, was found, and the proviso therein for deans and chapters, &c. And that the king had it as chantery land, and gave it to Sir Edward Montague, &c., under whom the defendant claims. And the dean and chapter entered and

let to the plaintiff, and if, &c. And it was moved, that this was a chantery indeed, or at least in reputation, and so given to the king; and of that opinion were *Daniel* and *Warberton*. For it appears, that the lands were purchased for this cause, and to this purpose, and a priest maintained therewith; so as it is a chantery in reputation, if it be not in fact: nor were those lands the proper possession of the dean and chapter, within the intent of the proviso of the statute; but their possessions to this purpose only; and therefore they are given to the king by the statute of *primo Edw. 6*, but the other justices *e contra*; because there be not any lands given by Dalby; and his intent cannot make a chantery; and the dean and chapter did not make any chantery, nor appoint any lands thereto, but oblige their goods for the payment of an annual sum to a priest, &c. and that sum which was paid, was not paid out of the land only, but out of all their possessions; and when no lands certain are given to that purpose, nor employed for that purpose, it is not reason they should be given to the king: wherefore it was adjudged for the plaintiff.”—Mich. Term, 2 Jac. Com. Banc.

At the time when this case was decided, there were five judges of the Common Pleas, which will account for the plaintiff's having a majority in his favor, after two of them had given their opinions against him.

1826.

KING

v.
BUTTER-
WORTH.

1826.
KING
v.
BUTTER-
WORTH.

in this action was laid in St. Dunstan's, and there would have been a nonsuit, if that had not been proved. The Jury also found a special verdict, in which, from the beginning to the end, the whole of the property is described as in the parish. The result of this action was, that by a judgment in error, pronounced in the second year of James the First, the property was restored to the Dean and Chapter of York, who have possessed it ever since. In the year 1676, the judges and serjeants, who at that time lived in the inn, were desirous of having a chapel consecrated there, and in consequence they petitioned; and a deed of consecration was executed, in which the description accords with that in the other documents; and in it there is a clause saving "the rights and oblations" of the parish of St. Dunstan "to it of right or custom or in any wise howsoever due." Now, this being an ecclesiastical instrument, (and the division of parishes being an ecclesiastical matter), it is a document of great authority on the subject of the present claim. Would not the judges and serjeants have got some exception inserted, if it were true that the parish had no rights within the Inn? But, in addition to this, the parish were, about this time, at expenses for accommodation for the judges in the parish church, and paying the parish officers for attendance upon them. There is no doubt but the judges gave largely in charity, and respect for their feelings might lead the parish officers to omit them in the rates, especially as rates at that time were not of much importance. But they could not have put themselves to expense in repairing pews, &c. for the judges, if the judges had not been parishioners. About the year 1658, monthly assessments were made, according to districts, by commissioners, for the use of the commonwealth; and those assessments for Serjeant's Inn were collected amongst those made in the parish of St. Dunstan. It is clear, that some part of this property, which is all held under one title, has been rated to the poor; and if an exception can be claimed for the place, then it will be

difficult to account for this circumstance; but if, as I contend, the exception was to the persons, and not to the place, then the situation of the persons, being judges of the realm, furnishes a reasonable ground for such exception.

1826.

 KING
 v.
 BUTTER-
 WORTH.

Translations, examined with the originals, were then put in, of the writ of *ad quod damnum*, the licence to hold in mortmain, the particular, and the grant from the crown to Lord Chief Justice Montague, as were also an examined copy of his Lordship's will, and the judgment in the 2d James I. The deed of consecration of the chapel in the year 1676 was also put in. The whole of these documents corresponded with the statement given of them by *Wilde*, Serjt.

Mr. Hopkins, the vestry clerk of the parish, then produced from the parish records an ancient book, called "Domesday-book," commencing 1st Eliz. (1558). There was an item, among others, of 6s. 2d., received of the judges and serjeants for the finding of buckets to be used in case of fire. The witness also produced the Scavenger's Rate-books for the years 1627 and 1628. There was a charge of "Serjeant's Inn, 5s.," and an item of 3s. 6d. for a house next but one to Serjeant's Inn, occupied by Matthew Holloway, and 3s. 6d. for another, and 2s. 8d. for another, and then came Ram Alley, for which no charge was made.

[The back parts of some of the houses in Serjeant's Inn are built upon ground which was formerly the site of houses in Ram Alley, and which is clearly within the parish of St. Dunstan.]

The Vestry Minute Book was then produced, containing the churchwardens' accounts examined and allowed by the vestry. In the account for the year 1600, were the following items:—"Paid for the underpinning of my Lord Chief Justice's pew, 6s.;" "Paid, mending my Lord Chief Justice's pew, and the other pews, 40s." In the account for 1609, was an item, "Paid, for Serjeant's Inn, three quarters of a year, for font water, 1s. 6d." Under the date of the 20th of October, 1634, was an entry of an or-

1826.
 KING
 v.
 BUTTER-
 WORTH.

der of vestry, that the senior churchwarden should provide twelve green cushions for the judges' pews in the church. In the account for the year 1661, was an order of the 4th of September, for the payment of 8s. and 4s. to the two staff-men "for attending the judges in Serjeant's Inn, both in Fleet-street and Chancery-lane, during the four last Terms." There was also an order for the parish officers to advise with the judges upon certain matters relating to the parish interests. Evidence was also given of the assessments made in the time of the Commonwealth. They were stated to be made on the inhabitants and landlords of houses in the city part of St. Dunstan's, and to be charged monthly on the said parish, for the temporary supply of the armies and navies. There was this entry, "In the precinct next Ludgate: Serjeant's Inn, on the landlord, 6s. 3d." There was an entry of 4s. charged on the landlord of two houses adjoining. Entries of a similar description were continued up to Christmas, 1661.

The stat. 25 Car. 2, c. 1, was also referred to as bearing on the subject.

Mr. Hopkins, the vestry-clerk, was then cross-examined by *Vaughan*, Serjt. He said, that he had been a parishioner for thirty years, that he had collected Easter-offerings for the vicar from some gentlemen in the Inn; that he was on the committee that prepared the act of the 1st Geo. 4, c. 59 (a), for the purpose of giving the vicar the rectory; that the seven names there specifically enumerated were the names of occupiers of those houses, parts of which abutted upon Ram Alley (being numbers 1 to 7, to the gate leading into the chapel); and that the reason why they

(a) A local and personal act.— The title of the act is, "An Act for uniting the Rectory and Vicarage of the Parish of St. Dunstan in the West, in the City of London, and for making a certain Annual Payment to the Rector of the Parish, in lieu of Tithes."

In a schedule to that act, every house in the parish is enumerated; but that schedule does not contain any of the houses in Serjeant's Inn; except seven, parts of which are in Ram Alley, which was admitted to be in the parish.

stopt there was, that the parish did not wish to disturb the old modus. He admitted, that for fifteen years, during which he had been connected with the perambulations on Ascension-day, he never remembered their going into Serjeant's Inn. The gates were shut; and the parish officers neither knocked nor used any other means for the purpose of obtaining admission.

1826.
 KING
 v.
 BUTTER-
 WORTH.

Vaughan, Serjt., for the plaintiff, then contended, that it was clear that the *locus* in question was not part of the parish of St. Dunstan. If it were so considered, it is most extraordinary, that several centuries should have been suffered to elapse without any claim for poor's rates being made. The question is, whether it is part and parcel of the parish, and subject to its jurisdiction; and not whether it is locally situate within it. The case of *Marsden v. Waithman* (a), tried on the 17th of this month, before Lord Chief Justice *Abbott*, is an authority against the claim of this parish. Much reliance has been placed on the description of the property in the documents put in; but as it is clear that a part of the property mentioned in those documents was within the parish, that will account for the circumstance of its being so described generally. It is said, that in *Holloway v. Watkins*, as the venue was laid in St. Dunstan's, there would have been a nonsuit, if that had not been proved; but in that case, the question of parochiality was not likely to be agitated; for the object there was, to try *the right of property*; and the particular house was Matthew Holloway's house, which was one that was indisputably within the parish. With respect to the re-

(a) That was an action brought to try whether Thavie's Inn was liable to contribute to the poor's rates of the parish of St. Andrew, Holborn; and it was there held, that a place might be locally situate within a parish, without being

part and parcel of that parish; and the jury, on the evidence there given, were of opinion, that Thavie's Inn was not part and parcel of the parish of St. Andrew, Holborn.

1826.
KING
v.
BUTTER-
WORTH.

pairs of the pews, the Lord Chief Justice, for underpinning whose seat a charge appears to have been made, might have lived in Bell-yard or in Chancery-lane. This same evidence was used on a former trial, as applying to Serjeant's Inn, Chancery Lane. Under the Land-tax Act, 4 W. & M. c. 1, s. 130, the land-tax for Serjeant's Inn was collected as for a separate precinct, and so continued till the reign of George the Second, and then it was provided that it should be collected by the district collector of the City of London. In addition to all this, the non-assertion of any right of entry into Serjeant's Inn by the parish in their perambulations, is a strong circumstance against the claim now made, as is also the fact of there being no other rates made upon the Inn, except the scavenger's rate.

BEST, C. J., said, in summing up to the Jury,—When a parish has for several hundred years acquiesced in the notion, that a particular place is not within it, a very strong case should be made out, before a Jury can be called upon to find that such place is within the parish. In this case, the property in question has passed through many different hands; and parties have no doubt given more for it than they would have done, if they had not thought that it was extraparochial; and they have been induced so to do by the conduct of the parish. I agree with my brother *Vaughan* that the knowledge, that part of the property mentioned in the conveyances was clearly within the parish, might induce the parties drawing them to describe it generally as in the parish. I think there is nothing in the observation with respect to the certainty of a nonsuit in the case of *Holloway v. Watkins*, if it had not been understood that the whole was within the parish of St. Dunstan; for I agree with my brother *Vaughan*, that, as the object in that case was to try the right of property, a point as to local description was not likely to be made; and in fact, as part of the property was undoubtedly within

the parish, there must have been a verdict as to that part, and therefore there could not be a nonsuit. As to the assessment for buckets to be used in case of fire, all persons near, whether in the parish or not, would be interested and disposed to make contribution. With regard to the assessments for the scavenger's rate made upon Serjeant's Inn, it appears to me, from the proportion charged, in comparison with other adjoining property, that the assessments were made only on the seven houses, and not on the other part. It is a curious circumstance, that much of the evidence used to-day as being applicable to Serjeant's Inn, Fleet-street, was used on a former trial as applying to Serjeant's Inn, Chancery-lane. As to the monthly assessments made in the time of the Commonwealth, the commissioners did not look to the boundaries of parishes, but merely to the ability of parties. But the land-tax act excludes Serjeant's Inn from the parish; and that is at least as strong as its inclusion in those assessments. It is a very strong fact, that although poor's rates have been established throughout England since the forty-third year of queen Elizabeth, yet not one sixpence of them has been paid by the inhabitants of Serjeant's Inn to this parish. But, it is said, this was from respect to the judges. The judges, I am sure, never had any desire that such respect should be shewn them. But the fact is not so; for they were called upon to pay other things; and the same respect would have applied in one case as another. The fact, that the parish in the perambulations never asserted their right to enter Serjeant's Inn, is also very strong against them, as is also the Act of Parliament relating to the tithes. It is for you (the jury) to say, whether, as this parish has for several hundred years acquiesced in the notion, that the property in question was extra-parochial, they have made out so strong a case as to justify you in finding that it does in fact form a part of the parish.

1826.
King
v.
BUTTER-
WORTH.

The Jury found for the plaintiff.

1826.

KING

v.

BUTTER-
WORTH.

Vaughan and Bosanquet, Serjts., and *F. Pollock*, for the plaintiff.

Wilde and Spankie, Serjts., and *Merewether*, for the defendants.

[Attornies—*Barendale, T. & U.*, and *Morshead*.]

In the ensuing Michaelmas Term, *Wilde*, Serjt., moved for a new trial, but the Court refused a rule.

Nov. 1st.

BLIGH v. WELLESLEY.

A person, to whom certain letters required to be produced on a trial, were written, said, that he had searched in a particular box in which he thought he had put them, without being able to find them, but added, that he thought they were somewhere in his possession, but that he had not searched in any other place than the box:—Held, that enough had not been done to let in secondary evidence of the contents of the letters.

CRIM. CON.—Certain letters, written by Mr. Hamilton, the English minister at the Court of Naples, to the defendant, on the subject of an application made to him to introduce Mrs. Bligh at that Court, after she had left her husband's house, were tendered in evidence. The letters of the defendant, to which Mr. Hamilton's were answers, were not in Court. Mr. Hamilton, who was called as a witness, stated that he thought he had put them in a particular box, which box he had searched, and did not find them in it; but he added, that he thought they were somewhere in his possession; and he had not searched in any other place than the box to which he had alluded.

BEST, C. J., was of opinion, that enough had not been done to let in secondary evidence of the contents of the defendant's letters, and that, without those letters, the answers of Mr. Hamilton could not be read.

It subsequently appeared in the course of the trial, that these letters of Mr. Hamilton had been found in some apartments occupied by the defendant and Mrs. Bligh, under an assumed name, and which apartments they had suddenly left.

BEST, C. J., upon this, allowed them to be received, not as proof of their contents, but as evidence of a notice to the defendant of the grounds upon which Mrs. Bligh professed to have left the house and protection of her husband.

1826.
BLIGH
v.
WELLESLEY.

Verdict for the plaintiff—Damages, 6000*l*.

Vaughan and *Wilde*, Serjts., and *D. F. Jones*, for the plaintiff.

Scarlett, *Spankie*, Serjt., and *Brougham*, for the defendant.

[Attornies—*Lowless, C. & B.*, and *Griffith*.]

PERRING, Bart., and Others v. HONE.

Nov. 4th.

ASSUMPSIT on a promissory note for 1000*l*.

The plaintiffs were bankers in London, and the defendant one of eight directors of a Company, called “The Imperial Distillery Company.” At a meeting of the directors, at which the defendant attended, a sum of 2000*l*. was lent to the Company by the plaintiffs, and a joint and several promissory note, at six months, was given for it. Some short time after, by a resolution of the directors, at a meeting which the defendant did not attend, half of the money was repaid, upon which the first note was cancelled, and the one in question given for the remaining sum. It was dated the 4th of February, 1826, and was for payment at three months. When this note was signed by the defendant and the rest of the directors, (with the exception of one), it did not contain the words, “jointly and several-

Certain persons, directors of a Company, borrowed of certain bankers, for the use of the Company, 2000*l*., for which they gave a joint and several note. Shortly afterwards, at a meeting of the directors, at which one of them was not present, half the money was paid off, and a joint promissory note drawn, to which the signatures of all the directors were obtained: this note, on being

tendered to the bankers, was refused; upon which the secretary of the Company, who had no general authority, consulted with two of the directors, neither of them being the one who did not attend the meeting, and, with their permission, added to the note the words, *jointly and severally*.—Held, in an action on the note by the bankers against such one director, that he was not liable, though, on being written to for payment, his only reply was, that, from the death of a relation, he could not then attend to the subject, but would give it his earliest attention:—Held also, in the same case, that such one director was not liable upon the original consideration, though he was present when the money was borrowed, it appearing that one of the plaintiffs, the firm being composed of three, was an original holder of shares, which had been afterwards sold, and the produce of them paid to another of the plaintiffs.

1826.
 PERRING
 v.
 HONE.

ly." It was taken in that state to the plaintiffs, who refused to receive it, unless it was made a joint and several note, as the former had been. Upon this, the secretary, who had not any general authority to accept bills, after consulting two of the directors, altered the note, by adding the words "jointly and severally." The plaintiffs then received the note, and, on the 8th of May, they wrote to the defendant for payment. On the 9th, the defendant sent an answer to their letter, expressive of regret, that, on account of the recent death of his father, it would not be in his power to see his coadjutors for some days on the subject of it, but stating that he would give it the earliest possible attention.

BEST, C. J., was of opinion, that this letter was not sufficient to shew an assent by the defendant to the alteration made.

Taddy, Serjt., for the plaintiffs, then contended, that they were entitled to recover on the money counts, the defendant having been present at the meeting at which the original sum of 2000*l.* was lent.

For the purpose of answering this, by establishing a partnership between plaintiff and defendant, the secretary was asked whether Sir John Perring was not one of the original subscribers to the Company, and he stated that he was, and produced a book, in which the name of Sir John Perring appeared, among many others. In reply to the objection of partnership, proof was given of a sale of forty shares and scrip receipts (*a*) by a broker, the money obtained for which was paid to Mr. Barber, a member of the

(*a*) They were in this form:—
 "London, 28th March, 1825, Received of the Directors of the Imperial Distillery Company, 25*l.*
 For Messrs. Pitt, Bosanquet, & Co."

plaintiff's house, the firm consisting of Sir John Perring, Mr. Shaw, and Mr. Barber. It was contended, that, by this sale, any connection which the plaintiffs might have had with the Company was put an end to. A deed was produced, purporting to be between the directors, and such of the subscribers as had set their hands and seals. There were many seals with names against them, and many without. The names of neither of the plaintiffs were among the number.

1826.
 PERRING
 v.
 HONE.

BEST, C. J., directed the plaintiffs to be called, upon two grounds: *First*, because, on account of the alteration, they could not sue upon the note; and *secondly*, because Sir John Perring having been proved to be one of the original members of the Company, and there being no evidence of his having ceased to be a member, he must be taken to be a partner in the concern, and therefore not entitled to recover against his co-partners; and his Lordship gave it as his opinion, that, when a person has once become a member of such a Company, he must be taken to continue so with all his liabilities, until such time as he shall get rid of his connection with it, by the assent of the other members.

Leave was given for a motion to set aside the nonsuit, and enter a verdict for the plaintiff.

Taddy, Serjt., and *Moody*, for the plaintiffs.

Wilde, and *Adams*, Serjts., for the defendant.

[Attornies—*Gregson & F.*, and *Fisher & N.*]

IN the ensuing Michaelmas Term, *Taddy*, Serjt., moved, pursuant to the leave given, to set aside the nonsuit. As to the point of the alteration, if an alteration takes place, in pursuance of the original intention of the parties, and before the issuing of the note, that is, before it gets into the

1826.
 PERRING
 v.
 HONE.

hands of a party who may sue upon it, it will do. He cited *Kershaw v. Cox* (a), referred to in *Knill v. Williams* (b).

GASELEE, J.—In *Kershaw v. Cox*, there was no dispute as to the authority; here, the alteration was made by consent of all parties.

Taddy, Serjt.—It may be inferred, from the nature of the transaction, that it was the intention of the parties to give a joint and several note; and in such a case a very little evidence of assent will be sufficient. And there is enough in the defendant's letter to establish such evidence; for he does not say, "I never became liable," nor "the contract was not joint and several," but only gives a reason for postponing his attention to the application. Then, with respect to the question of partnership, the book put in by the secretary was not legal evidence, according to the case of *Fraser v. Hopkins* (c).

BEST, C. J.—There was a sale by Mr. Barber of forty of the receipts for money paid.

Taddy, Serjt.—The purchase and sale were by the individual partners, and not by the plaintiff's firm.

BEST, C. J.—They should have got their names struck out of the list.

Taddy, Serjt.—There was no evidence that we knew of it. The list was a mere prospectus. Though two of the

(a) 3 Esp. N. P. C. 246. The point there decided, is, that where a bill of exchange was put into circulation by indorsement, though it wanted the words "or order," the insertion of those words

by the drawer, with the consent of the parties, neither vitiated the instrument, nor made a new stamp necessary.

(b) 10 East, 433.

(c) 2 Taun. 5.

plaintiffs were individually partners in the concern with the defendant, yet that will not prevent a recovery by the firm. He also cited the cases of *Downes v. Richardson and Others*(a), and *Bolton v. Puller and Others* (b).

1826.
PERRING
v.
HONE.

The Court granted a rule to shew cause.

THE rule came on to be argued in the course of the Term.

Wilde, Serjt., shewed cause.—There is no difference between these parties as distillers and any other trading house in London. It is said, that by the sale of the receipts, the parties have got rid of their connection with

Nov. 22d.

(a) 5 B. & A. 674. An accommodation bill was jointly made by three persons as drawer, acceptor, and first indorser, which was afterwards parted with for value; but, previous to its being so parted with, its date was altered. The acceptor, when he was informed of it, assented to the alteration:—Held, that it was no answer to an action on the bill against him, that the alteration had been made without the consent of the drawer and first indorser: Also, that a fresh stamp was not necessary, the bill having been altered before it was issued; because, being an accommodation bill, it could not be said to be issued till some person got it, who was entitled to treat it as a security available in law.

(b) 1 Bos. & P. 539. A., B., C., and D. were partners in a banking-house at Liverpool, and C.

and D. also carried on a separate mercantile concern in London; J. S., having accepted bills payable at the house of C. and D., employed A., B., C., and D. to get them paid accordingly, and agreed to deposit with them good bills, indorsed by him, for the purpose of enabling them so to do. A., B., C., and D. debited J. S. in account for his acceptances, and credited him for all the bills which he deposited; some of the bills so deposited by J. S. were remitted by A., B., C., and D., to C. and D., upon the general account between the two houses; and before any of the acceptances of J. S. became due, both houses failed, and J. S. was obliged to pay his own acceptances:—Held, that the assignees of C. and D. were entitled to retain against J. S. the bills remitted to them by A., B., C. and D.

1826.
 PERRING
 v.
 MONK.

the Company; but, have they sold their responsibility? or their liability to indemnify the directors, who may have made themselves personally answerable to the public? In the deed, which is dated the 19th of March, 1825, there is a clause, that, if a member wishes to retire from the concern, he must give notice to the directors of some person to succeed him. Sir John Perring may, by the sale, have secured to himself an equitable right to place some other person ultimately in his shoes; but he cannot, by the sale only, get rid of his liability to the directors, who took the responsibility of management on the credit of the general partnership. With respect to the alteration, the cases cited on the motion for a rule *nisi* were cases on the stamp act; and the alterations were made by the parties, or by competent authority on their behalf. But, in this case, the secretary allowed that he had no authority. but said that he asked two of the directors, (the defendant not being one), and, having obtained their permission, made the alteration, thinking it no harm.

Taddy, Serjt., in support of the rule.—If there was a partnership, then the directors formed a part of that partnership; and the alteration of the note having been made with the assent, and by the authority of two of them, it will be sufficient to bind the rest. But the three plaintiffs were not partners with the Company. It appears, that Mr. Shaw had no connection with the concern. As Sir John Perring did not sign the deed, the circumstance of his merely buying could not make him a partner. The Vice-Chancellor has lately, in this Term, decided that there was fraud on the part of the directors, and that the subscribers are entitled to relief against them. Therefore, the argument that the subscribers had induced the directors to manage on their responsibility, must fall to the ground. There is no evidence of any assent on the part of Sir John Perring to the insertion of his name in the book.

The selling of the receipts is merely the assignment of a *chose in action*, if, indeed, it amounts to that; or perhaps it is rather the parting with an inchoate right, a shadow of a shade, a thing which *may be* something. It is the wildest doctrine in the world to contend, that persons who never act in any way are to be considered as partners. As the defendant did not write a second letter, the first might be considered by the Jury as a waiver of his objection to the alteration of the note.

1826.

 PERRING
 v.
 HONE.

BEST, C. J.—I do not intend to impute any thing morally wrong to Sir John Perring. I agree with the Vice-Chancellor's decision, as it is reported to me. In this case there are two points: *First*, Whether the plaintiffs can recover upon the note. I am of opinion that they cannot, because the alteration was made in it without the defendant's authority. I was not desired at the trial to leave the letter to the Jury as evidence of assent. But I think, that it is no evidence of assent at all. The authority of one partner to bind another does not extend to the alteration of a joint note into a joint and several one. But the *second* question in the case is the most important, and that is, if the plaintiffs can recover upon the original consideration. It appears, that the defendant was present when the money was first advanced; but then it was not advanced for his individual benefit, but it was paid to the bankers of the Company. It is said, that Sir John Perring was not a member, because he did not execute the deed; but I take leave to say, that, if there be a deed, persons who act on it by lending money under it, give their assent to it, and, being original subscribers, make themselves members. The regulation is a good one, which requires notice to be given of a successor, because otherwise a man might keep his shares till a Company was in a falling situation, and then withdraw, and release himself from all responsibility. A man who subscribes to a Company, looks to the charac-

1826.
 PERRING
 v.
 HONE.

ter of his co-subscribers; and it would be mischievous to let them renounce their responsibility, and get rid of their liabilities, as they would of their great coats. I hope that this decision will make great people cautious, how, by appearing as members of companies, they induce individuals to subscribe, and, when the shares are high, sell them, and think by so doing to throw the responsibility upon those who are left as holders of them. His Lordship then declared the opinion of the Court to be, that as Sir John Perring had been proved to be a partner with the defendant in the Company, the plaintiffs were not in a situation to maintain their action against him.

Rule discharged.

The case of *Bosauquet v. Wray*, 6 Taun. 597, was mentioned in the course of the argument. One of the points there decided was, that the partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners

in the plaintiff's house is also a member, for transactions which took place while he was a partner in both houses.

Upon the subject of Joint Stock Companies, the following cases have been recently decided:—

Dec. 23d.

KEASLEY v. CODD, Esq.

ASSUMPSIT for goods sold and delivered. The plaintiff was a harness maker, and the defendant one of the members of a Company, called "The London Carrier Company;" and the action was brought to recover a sum of 5*l.* 18*s.* 6*d.* for articles delivered by the plaintiff at the premises of the Company, in Great Queen Street, Lincoln's Inn Fields. No evidence was adduced as to who gave the order for the goods. On the 26th of May, 1826, the plaintiff's attorney wrote to the defendant, requesting payment of the money, or to be furnished with the name of the defendant's solicitor. The defendant himself did not answer this letter, but on the 2d June a letter was received from his attorney, stating (among other things) that the London Carrier Company consisted of a number of persons, of which the defendant was only one, and adding, that the Company was insolvent, and requesting a postponement of the matter till it could be ascertained how much in the pound its funds would be able to pay.

ABBOTT, C. J.—Well?—One must pay for all.

Denman, for the defendant.—I am in a situation to shew, that the Company was never regularly constituted.

1826.

ABBOTT, C. J.—That will make no difference. It is important, that the public should know, that if persons connect themselves with a Company of this description, they are every one of them liable to pay the demands upon it.

Verdict for the plaintiff—Damages, 5*l.* 18*s.* 6*d.*

Comyn, for the plaintiff.

Denman, C. S., and *F. Pollock*, for the defendant.

[Attornies—*T. Dignam*, and *Milburn*.]

(*Before* *BAYLEY*, J., who sat for the Lord Chief Justice.)

1827.

MAUDSLAY v. *LE BLANC*, Esq.

Jan. 11*th*.

ASSUMPSIT for work and labour. The plaintiff was an engineer, who sued the defendant as one of the directors of the Steam Washing Company, for a sum of 3173*l.* for a steam engine and other machinery erected on the premises of the Company at Clapham.

The defendant was proved to have been a director in May, 1825; and it appeared, that in June in that year, an order, which had been given previously to the month of May, by a person named Tyrrell, for the machinery in question, was confirmed by the directors at a meeting which the defendant did not attend, but he attended at subsequent meetings, and also inspected the works while they were in progress. The defendant's name was in a printed paper, purporting to be a prospectus issued by the Company, one of the terms of which was, that a deed should be executed by the members.

Parke, for the defendant, contended, that he was not liable. There is no evidence to connect the defendant with this particular order. The only proof is, that he acted generally as a director. The terms of the prospectus shew, that there must be a deed.

BAYLEY, J.—How are the public to know whether there is a deed or not?

Parke.—The only way in which the public can know that the defendant is a director, is by the printed prospectus, and that same prospectus requires that there should be a deed. There is no credit given to the defendant. They are bound to shew, that he executed the deed.

BAYLEY, J.—I think they are not. I shall take it for granted, that the defendant would never have continued to act as a director so long, with-

1827.

out he had executed the deed. It appears to me, that he is liable as a partner. He was at the meetings of the directors, acting from time to time, and went to see the works in progress. I think, therefore, it is impossible to say that he is not liable.

Verdict for the plaintiff—Damages, 317*3*l.

Scarlett, Gurney, and Steer, for the plaintiff.

Parke, for the defendant.

[Attornies—*Browning*, and *J. S. Clarke*.]

In the case of *Watkins v. Huntley*, tried December 11th, 1826, which was an action brought against a proprietor of shares in the Equitable Loan Bank Company, by a person to whom, he had sold them, to recover back the money paid, because the Company was dissolved,—*Best*, C. J.,

held, that the plaintiff was entitled to recover, on the ground that the consideration had failed; and his Lordship said, that in the case of *Kempson v. Saunders*, (*ante*, p. 366), the Court of Common Pleas, on the motion for a new trial, had expressed a similar opinion.

OXFORD SPRING CIRCUIT,

1826.

BEFORE MR. JUSTICE PARK AND MR. BARON GARROW.

(Of admitting King's Evidence.)

THE Judges will not, in general, admit an accomplice as king's evidence, though applied to for that purpose, in the usual way, by the counsel for the prosecution, if it appear that such accomplice is charged with any other felony than that on the trial of which he is to be a witness.

This was laid down in several cases by Mr. Justice *Park* in this Circuit.

This practice appears to have been resolved on in consequence of the cases of *Rex v. Lee*, Russ. & Ry. C.C.R. 361, and *Rex v. Brunton*, Russ. & Ry. C. C. R. 454. In each of those cases, an accomplice in one capital felony had been admitted as king's evidence, but at the same assize was himself convicted of another distinct capital felony; and in both cases

the Judges held, that, as matter of right, the king's evidence was not exempt from prosecution for offences distinct from that respecting which he gave evidence; but that it was in the discretion of the learned Judge, whether the sentence for the capital offence, of which he was convicted, should be carried into effect.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

Feb. 27th.

REX v. MARY ANN KING and AMY KING.

A receiver of stolen securities for money is not punishable as an accessory to the felony, under the stat. 3 Geo. 4, c. 24. It is considered, that, from its inaccuracy, no conviction can take place on that statute.

THE prisoner, Mary Ann King, was indicted for stealing one 10*l.* and two 5*l.* promissory notes, the property of Thomas Thame; and the other prisoner, Amy King, was charged with having feloniously received the same, knowing them to have been stolen. The facts being clearly made out,—

Curwood, for the prisoners, contended, on the part of the receiver, that she ought not to be convicted. It had been held, that receivers of stolen securities for money were not punishable as accessories to the felony before the passing of the statute 3 Geo. 4, c. 24; and that statute being so inaccurately penned, the learned Judges had thought that no conviction ought to take place upon it.

PARK, J., observed, that that had been the opinion of the Judges, in which he completely concurred; and his Lordship therefore directed the receiver to be acquitted.

The Jury then found the principal—Guilty,
the receiver—Not Guilty.

Justice, for the prosecution.

Curwood, for the prisoners.

[Attornies—*Tomes*, and *Compigny & D.*]

Receivers of stolen securities for money have been held not to be punishable as accessories to the felony. This was decided in the cases of *Sadi* and *Morris*, 1 Leach, 458, and 2 Ea. P. C. 748; and in *Gaze's* case, Russ. & Ry. C. C. R. 384, where the Judge held, that although a statute, which

creates a new felony, will attach to that felony all the common law incidents to felony, so that accessories thereto will be included, yet it will go no farther; and a receiver of stolen goods not being a common law accessory, it will not affect him.

1826.

REX v. JAMES STREEK.

Feb. 28th.

THE prisoner, who was in custody, was indicted for an assault on Sophia Woodley, with intent to commit a rape. The examination in chief of the prosecutrix was nearly concluded, when the prisoner fainted away, and was, by order of the learned Judge, assisted out of Court.

The prisoner's counsel consented that the trial should proceed in his absence; and the examination of the prosecutrix was further proceeded with for a short time.

PARK, J., however, doubted, whether, as the prisoner was tried under the commission of gaol delivery, it would not be a mis-trial, if the case proceeded in his absence; and (having conferred with *Garrow*, B.,) his Lordship observed, that the case could not go on in the absence of the prisoner without his consent; and he doubted, whether the consent of his counsel would be sufficient, this not being like the case of a defendant, who is absent when the judgment is given on him in the Court of King's Bench, as that is done with his own consent, and generally on his own application. His Lordship then discharged the Jury, and

If at the assizes a prisoner is tried for a misdemeanor under the commission of gaol delivery, and during the trial becomes ill, and is obliged to be assisted out of Court, the Judge will discharge the Jury; and the consent of his counsel, that the trial shall proceed in his absence, is considered not sufficient to authorize the trial to proceed. If the prisoner recovers during the assize, he may be tried, the whole of the proceedings of the trial being commenced *de novo*.

Adjourned.

The prisoner having sufficiently recovered, the trial was commenced *de novo*. The Jury were resworn, the usual proclamations made, and the witnesses resworn, when

March 1st.

PARK, J., said, that the prosecutrix should be examined *de novo*, if either party desired it.

But, by consent, her evidence, as far as it had gone, was read over to her; and she stated it to be true. The trial then proceeded as in other cases.

Verdict—Guilty.

1826:

REX
v.
STRECK.

Talfourd, for the prosecution.

Curwood, for the prisoner.

[Attornies—*Newbury*, and *Compigny & D.*]

In the case of *Rex v. Edwards*, Russ. & Ry. C. C. R. 224, where a juror became ill during the trial, so that he was incapable of attending the remainder of the trial, it was held by the twelve Judges that the Jury might be discharged, and the prisoner be tried *de novo*,

or that another juror might be added to the eleven; but if another juror were added, it was considered, that, in cases of felony, the prisoner should be offered his challenges over again as to the eleven, and that they should be sworn *de novo*.

OXFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

March 2nd.

REX v. SIMON ROSENSTEIN.

If, on the trial of an indictment for publishing an obscene snuff box, a witness prove that the defendant exhibited to him the box produced on the trial, or a box exactly similar, this is not sufficient, if the witness cannot identify it as the very box exhibited to him.

Seemle, that a count charging the defendant with having an obscene libel in his possession with intent to publish it, is not good.

INDICTMENT for publishing an obscene libel, in offering for sale a snuff-box containing an indecent painting. Another count of the indictment charged the defendant with having another snuff-box of the same kind in his possession, *with intent to publish* it. But this latter count was abandoned at the outset of the case, on the suggestion of the learned Judge, who thought it highly doubtful whether it could be sustained in point of law.

Mr. Ince, a commoner of Brazen-nose College, being called for the prosecution, and a snuff-box, such as was described in the indictment, (which, with others, was found on the prisoner's person), being put into his hand, stated that the prisoner had produced to him a box which was either the very same, or one precisely similar, and had asked him to purchase it, but that he declined doing so, and returned the box to the prisoner. He stated, that he could not swear to the identity of the box produced, as he

knew that snuff-boxes were made in considerable numbers of the same pattern, and therefore the box produced might be only a similar one.

1826.
 Rex
 v.
 ROSENSTEIN.

The defendant's counsel objected, that it must be proved, that the box produced was the identical box offered to Mr. Ince.

PARK, J.—If the Jury are not satisfied by the evidence that this was the identical snuff-box offered by the prisoner, he must be acquitted. It is absolutely essential that the box itself should be shewn to be the very same, which is not done in this case.

Verdict—Not Guilty.

Cross, for the prosecution.

Curwood, for the prisoner.

[Attornies—*Merrell* and *Roberson*.]

In the case of *Rex v. Hon. Robert Johnson*, a letter from the defendant, asking a third party to publish certain libels, was lost, and on the trial of an information against the defendant for the publishing of those libels, secondary evidence was given of the contents

of that letter. It may, therefore, be proper to consider, whether, if the identical libel published was in the possession of the defendant, and he had notice to produce it, and did not, secondary evidence might not be given.

BEFORE MR. BARON GARROW.

REX v. JOHN STIMPSON.

March 3d.

INDICTMENT, for stealing peas from a granary.

The case for the prosecution rested merely on the fact of

case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he (the prisoner) bought them of J. T.; if the prosecutor call J. T., he can only ask him as to such matters as go to negative the prisoner's case, and cannot prove by him that he saw the prisoner commit the theft.

On an indictment for a larceny, if the prosecutor rests his

1826.
Rex
v.
STIMPSON.

a part of the peas being found in the house of the prisoner, shortly after they were lost.

For the defence, the prisoner's daughter proved, that the prisoner had purchased the peas from a person named Taylor, for three shillings.

Twiss, for the prosecution, proposed to call Taylor, to prove, not only that the prisoner did not buy the peas of him, but that, on the contrary, Taylor saw the prisoner steal them, and assisted him in so doing.

Carrington, for the prisoner, objected, that the prosecutor was not then at liberty to adduce further evidence of the prisoner's guilt. The learned Judge might, at any period of the cause, ask any question for the furtherance of justice, but the prosecutor, after the evidence given by the prisoner's daughter, could only give such matters in proof, as went to contradict the specific facts deposed to by her: as that Taylor did not sell the peas, or that the price was not three shillings, or the like.

GARROW, B.—I think that is so. This witness appears to be only a witness in reply, and therefore his testimony is only admissible so far as it goes to destroy the case set up on the part of the prisoner.

Verdict—Not Guilty.

Twiss, for the prosecution.

Carrington, for the prisoner.

[Attornies ———, and D. Taunton.]

STAFFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PARK.

WOOLEY v. BATTE.

March 10th.

ASSUMPSIT for contribution. Plea—General issue. The plaintiff and defendant were joint proprietors of a stage coach; and damages had been recovered in an action *on the case*, against the former *only*, for an injury done to Mrs. Jeavons, a passenger, by reason of the negligence of the coachman. The plaintiff had paid the whole of the damages and costs, and brought the present action to recover half the amount from the defendant as his partner.

If a party recover damages *in case* against one of two joint coach proprietors for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened.

For the plaintiff, an examined copy of the judgment against him at the suit of the husband of Mrs. Jeavons, was put in. The declaration was in case, and stated the injury to have arisen from the negligence of the present plaintiff and his servants, (in the usual form). It was also proved, that the plaintiff paid the amount of damages and costs in that action, amounting to 176*l.*, under an execution; that the plaintiff and the defendant were partners in the stage coach; and that the plaintiff *was not personally present* when the accident happened.

Jervis, for the defendant, contended, that as the action brought against the plaintiff was an action on the case for negligence, the plaintiff and defendant were joint tort feazors; and, therefore, one only being sued, he could not recover contribution from the other; and he cited *Merryweather v. Nixan* (a).

(a) 8 T. R. 186. In that case, the plaintiff and defendant were both sued in an action on the case for an injury done by them to the rever-

sionary interest of a mill belonging to a person named Starkey, who recovered 840*l.* against both, but levied the whole on the plain-

1826.
 WOOLEY
 v.
 BATTE.

Campbell, for the plaintiff.—No doubt the case of *Merryweather v. Nixan* is good law, and one tort feazor sued alone cannot recover contribution from another, who was a joint tort feazor with him; but here it is proved, that there was no personal fault in the plaintiff. The declaration of Jeavons against the present plaintiff might, with equal propriety, have been in *assumpsit*; in which case, the present plaintiff might clearly have recovered contribution; and it can hardly be contended, that the plaintiff should be deprived of his contribution by Mr. Jeavons's pleader drawing his declaration in one form instead of another.

PARK, J.—I think the plaintiff is entitled to recover.

Verdict for the plaintiff.—Damages, 88/.

Campbell and Russell, for the plaintiff.

Jervis, for the defendant.

[Attornies—*Willim & Son*, and *Shutt*.]

tiff, who sued for contribution. as between joint wrong doers; and
 Mr. Baron *Thompson*, who tried the Court above concurred in that
 the cause, held, that no contribu- opinion.
 tion could, by law, be claimed

(*Crown Side*.)

BEFORE MR. BARON GARROW.

March 15th.

REX v. DERRINGTON and Others.

If a prisoner in gaol on a charge of felony, ask the turnkey of the

THE prisoners were indicted for a burglary in the house of Mr. George Simcox.

gaol to put a letter into the post for him, and after his promising to do so, the prisoner give him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmit it to the prosecutor;—this letter is admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained.

For the prosecution, a letter written by the prisoner Derrington was offered in evidence. It appeared, that, after Derrington was committed to Stafford gaol on this charge, he asked the turnkey if he would put a letter into the post; he promised to do so, and the prisoner gave him the letter in question, which was addressed to the prisoner's father; but instead of putting the letter into the post, the turnkey gave it to the visiting magistrates of the gaol, who sent it to the prosecutor.

1826.
 Rex
 v.
 DERRINGTON

Curwood, for the prisoner, objected, that a letter so obtained ought not to be admitted in evidence against the prisoner. This was a letter addressed by the prisoner to his father, and was obtained by a gross breach of trust. If the prosecutor had obtained the slightest verbal confession, by making the prisoner believe it was better for him to make such confession, it would be instantly rejected by the learned Judge; but here, by the most gross violation of all faith, the prosecutor obtained the possession of the most confidential letter a man could write, and then wished to adduce it in evidence. He therefore contended, that a letter so obtained came within the same rule as a confession made under a threat or promise.

GARROW, B.—I am clearly of opinion, that, in point of law, this letter is admissible in evidence. I remember, many years ago, making this very objection before the late Mr. Justice *Gould*, who overruled it. The only cases in which what a prisoner says or writes is not evidence, are two; 1st, where the prisoner is induced to make any confession in consequence of the prosecutor, &c. holding out any threat or promise to induce him to confess; and 2^{dly}, where the communication is privileged, as being made to his counsel or attorney. This not being either of those cases, I must receive the evidence.

Verdict—Guilty.

1826.

REX

v.

DERRINGTON

Ryan and Whateley, for the prosecution.*Curwood*, for the prisoner.[Attornies— ———, and *Passman*.]

BEFORE MR. JUSTICE PARK.

March 18th.

REX v. JOHN HUGHES.

Injuring a sheep by setting a dog at it, is not such a maiming or wounding as is within the stat. 4 Geo. 4, c. 54, s. 2.

THE prisoner was indicted on the stat. 4 Geo. 4, c. 54, s. 2, for feloniously wounding a sheep.

It appeared, that the prisoner set a dog at the sheep, and that the dog, by biting it, inflicted several severe wounds.

Corbet, for the prisoner, objected, that this was not a wounding by the prisoner.

PARK, J.—This is not an offence at common law, and is only made so by a statute; and I am of opinion, that injuring a sheep by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute.

Verdict—Not Guilty.

By the stat. 4 Geo. 4, c. 54, s. 2, it is enacted, that "if any person shall unlawfully and designedly kill, maim, or wound any cattle, whether from malice conceived against the owner, or otherwise, or shall procure, counsel, aid or abet the commission of the said offences, or of any of them, or shall forcibly rescue any person lawfully in custody of any officer, or other person, for any of the said offences, every person so

offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for such term not less than seven years as the Court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years."

Pigs, are cattle within the terms of this act; *Rex v. Chapple*, Russ. & Ry. C. C. R. 77; and so are asses. *Rex v. Whitney*, Ry. & M. C. C. R. 3. However, the indictment must specify the sort of cattle; and saying that the prison-

er maimed certain cattle, is not sufficient. *Rex v. Chalkey*, Russ. & Ry. C. C. R. 258. The wound need not be such as to cause permanent injury. *Rex v. Haywood*, 2 East, P. C. 1076, and Russ. & Ry. C. C. R. 16.

1826.

REX
 v.
HUGHES.

HEREFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PARK.

PROSSER v. ROWE.

March 22d.

MONEY had and received. Plea—General issue.

For the plaintiff, who was a widow, it appeared, that she had gone from Hereford, where she resided, to Ludlow, to receive the money in question, which was a dividend due to her on a bankrupt's estate; and that, being very feeble, she took the defendant, who was a much younger woman, with her. The defendant prevailed on the plaintiff to let her have the money to take care of, and carry it to Messrs. Garret's Bank at Hereford, for the plaintiff's benefit. The defendant, it was proved, never paid the money in at Messrs. Garret's, and gave different accounts of what she had done with it.

The defence was, that the defendant had paid over the money to the plaintiff; but that entirely failed in proof.

PARK, J.—I think this case comes very near a felony. It too much resembles the case of the unfortunate man at Shrewsbury, whom I sentenced to be transported a few days ago (a). However, I shall leave it to the Jury to

In an action for money had and received, if it appear that the defendant received the money from the plaintiff to carry to a bank, and that, instead of so doing, the defendant kept it;—the Judge will leave it to the Jury to say, whether the defendant received it with an intent to steal it, and then feloniously converted it; and if the Jury find this in the affirmative, the Judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this finding.

(a) *Rex v. Goode*, tried at the Shropshire Spring Assizes, 1825. In that case, the prisoner was indicted for stealing a 1000*l.* note.

1826.
 PROSSER
 v.
 ROWE.

consider, whether the defendant had the money; and if so, whether she got it into her possession with intent to steal it, and then feloniously converted it to her own use; because, if so, the debt being merged in the felony, the defendant will be entitled to the verdict; and if the Jury find for the defendant, and, on my asking them whether that is the ground of their verdict, they tell me that it is, the defendant must be sent over to the criminal side of the assizes, to take her trial for the felony (b); but, should the

It appeared, that he had persuaded the prosecutrix to let him have the thousand pound note, to deposit for her in the Bridgnorth Bank, she gave it to him for that purpose, but, instead of taking it to that bank, he converted it to his own use. The learned Judge left it to the Jury to say, whether he obtained possession of the note with intent to steal it; for, if so, they must find him guilty: which they did, and the prisoner was sentenced to be transported for seven years.

(b) As to when a party may be tried on a verdict, without any bill having been found by a Grand Jury, it is said, (2 Curw. Hawk. 291,) that in an action of trespass in the King's Bench, *de muliere abducta cum bonis viri*, if the defendant be found guilty of having carried away the woman and goods with force, and feloniously; or in a common action of trespass in the said Court for goods carried away, if it be found that the defendant feloniously stole them, he shall be put to answer the felony, without any further accusation; for such a charge by the oath of twelve men on their inquiry into the merits of a cause in a Court which has jurisdiction over the crime, is equivalent to

an indictment, and the king, being always in judgment of law present in Court, may take advantage of any matter therein properly disclosed for his benefit. The first of these positions is taken from 13 Ass. 6, and 13 Edw. 3, 32 a. The second, from 31 Edw. 1, Enditement 31. But such a verdict in a Court which has no jurisdiction over criminal matters, seems to be of little force, because such Court has nothing to do with such matters. 2 Curw. Hawk. 291. In the case of *The King v. Jeliffe*, 4 T. R. 285, the law before laid down on this subject is recognized, and the Court say, that the Judge of *Nisi Prius*, on the trial of a cause out of the Court of King's Bench, is to be considered, to all intents, as acting under the authority of that Court, and as an emanation from it; and Lord Kenyon, at the Sittings, said, in a case of slander, that "where a defendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff may be put upon his trial by that verdict, without the intervention of a Grand Jury. 3 Esp. 134." From this, it appears, that such a finding by the Jury at the Sittings at *Nisi Prius* in the Court of King's Bench is

Jury take a more merciful view of the case, they may negative the felonious intent, and find a verdict for the plaintiff.

1826.
PROSSER
v.
ROWE.

Verdict for the plaintiff.

Taunton and ———, for the plaintiff.

Russel, for the defendant.

[Attornies—*Pritchard*, and *J. Woodhouse*.]

Middlesex, would be sufficient to put the party on his trial, as the Court of *King's Bench* sits there. With regard to such a finding by the Jury on the civil side of the assizes, Lord *Hale* lays down (2 Hale, H. P. C. 151*), that "if in an action of slander for calling a man thief, the defendant justifies that he stole goods, and issue thereupon taken, it be found for the defendant, if this be in the *King's Bench*, and for a felony in the same county where the Court sits, or if it be before the Justices of Assize, who have also a commis-

sion of gaol delivery, he shall be forthwith arraigned on this verdict, as on an indictment, and the reason is, because here is a verdict of twelve men in these cases, and so the verdict, though in a civil action, serves the King's suit as an indictment, and is not contrary to the acts of 25, 28, and 42 E. 3, which enact, "that no man shall be put to answer, &c. but upon indictment or presentment." From this it appears, that if the finding be at the assizes, the Court from which the record comes, is not material.

GLOUCESTER ASSIZES.

BEFORE MR. BARON GARROW.

REX v. SAMUEL PITMAN.

March 31st.

THE prisoner was indicted for stealing a mare, the property of Jonathan Blanch.

It was proved, that the prisoner came to the George Inn, at Sudbury, on the fair day, and directed the ostler to bring out his horse. The ostler said, he did not know

If a thief go to an inn, and, intending to steal a horse, direct the ostler to bring out his horse, pointing to that of the prosecutor, and

the ostler at his desire lead out the horse for the prisoner to mount:—This is a sufficient taking by the prisoner to support an indictment for horse-stealing.

1826.
 {
 REX
 v.
 PITMAN.

which it was. The prisoner went into the stable, and pointing to the mare, said, "that is my horse, saddle him." The ostler did so, and the prisoner tried to mount the mare in the inn yard, but, from the noise made by some music, the mare would not stand still. The prisoner then directed the ostler to lead the mare out of the yard for him to mount. The ostler led the mare out, and before the prisoner had time to mount her, a person, who knew the mare, came up, and the prisoner was secured.

Watson, for the prisoner, objected, that this was not a felonious taking by the prisoner, as the mare was never in his possession. It all along remained in the possession of the ostler, who never parted with it; and if the mare was never in the possession of the prisoner, he could not be guilty of stealing it.

GARROW, B.—If the prisoner caused the mare to be brought out of the stable, intending to steal her, and the animal being disturbed by the music, the ostler led her out of the yard for his accommodation and by his procurement, that is a sufficient taking to constitute a felony.

The defence was, that the prisoner was drunk, and took the mare by mistake; and the Jury, on that ground, found him

Not Guilty.

Justice, for the prosecution.

Watson, for the prisoner.

[Attornies—*Abel*, and *Ward*.]

The strongest case on the subject of asportation is that of *Rex v. Walsh*, Ry. & M. C. C. R. 14. There the prisoner was indicted for stealing a bag; it was proved that he had lifted the bag from the bottom of the boot of a coach, but was detected before he had got it out; it did not appear that it was entirely

removed from the space it had first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part had occupied; and this was held by the twelve Judges to be a complete asportation, and the conviction for larceny was held to be right.

HOME SPRING CIRCUIT. 1826.

BEFORE LORD CHIEF BARON ALEXANDER AND MR. BARON
GRAHAM.

ESSEX ASSIZES.

BEFORE MR. BARON GRAHAM.

BEARBLOCK, Clerk, *v.* HANCOCK.

March 7th.

ASSUMPSIT for tithes bargained and sold to the defendant, of which the plaintiff was the farmer and proprietor. Pleas—The general issue; a tender of 39*l.*; and a set-off for potatoes bargained and sold to the plaintiff, and by him had and taken.

The time when the tithe of potatoes becomes the property of the parson, is when they are dug up and laid in heaps, and not when they are "bought out," while remaining in the ground.

The plaintiff was the lessee under the Warden and Fellows of New College, Oxford, of the tithes of the parish of Hornchurch, in the county of Essex; and the defendant was the tenant of a farm called "Little Nelms," in the same parish. It appeared, that in the month of *June*, 1824, the defendant entered into an agreement to give the plaintiff, as a composition for his tithes, (which for two years before had been taken in kind), a sum of 60*l.* *per annum*, for a term of three years, to be computed from *Old Michaelmas Day*, 1823; and the plaintiff consented to make an allowance out of the first 60*l.* in respect of such tithes as he had actually taken in kind, between the period when the agreement was made, and the previous time from which it was to take effect. On the 13th October, 1823, the defendant wrote to the plaintiff in the following terms:—

" *Mr. Bearblock,*

" Tithe of potatoes in the nine acres have been set out since Monday week; I have not heard of your having been to see it. I think of taking up to-morrow, "&c. &c.

1826.
 BEARBLOCK
 v.
 HANCOCK.

It was proved, that before old Michaelmas, the potatoes in question had been, what is called, "boughed out," that is, boughs had been placed in the field, to mark out the different proportions of the farmer and tithe owner; but it appeared, that they had not been dug up until some time after Old Michaelmas, and that they were not in a fit state to be dug up at any earlier period.

Marryatt, for the plaintiff, contended, that these potatoes, having been *set out* before Old Michaelmas, became *then* the property of the plaintiff, and were not to be accounted for in the year commencing afterwards.

Mirehouse, for the defendant, argued, that the tenth part of the potatoes could not be said to belong to the plaintiff till they were actually dug up and separated from the rest.

GRAHAM, B. — I am of opinion, that, in point of law, potatoes are not titheable till the farmer has dug them up. The parson is entitled to the labour of the farmer, and cannot take the tithe away till it is laid up for him in heaps. The preparatory step of "boughing out," is not the actual pertainancy of the tithe. A farmer could not have an action brought against him for not digging up his potatoes at a certain time, if, in the common course of good husbandry he ought to wait a fortnight longer, or more. I am of opinion, that the parson's right does not attach till after the digging up.

Verdict for the defendant.

Marryat and *Abraham*, for the plaintiff.

Mirehouse and *Round*, for the defendant.

[Attornies—*Sterry, T., & S., and Stone & B.*]

Marryat, in the ensuing Easter Term, moved to set aside the verdict, but the Court refused a rule.

OXFORD SUMMER CIRCUIT.

1826.

BEFORE MR. JUSTICE BURROUGH AND MR. BARON GARROW.

BERKSHIRE ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON GARROW.

REX v. PRISCILLA SKERRIT and ELIZA SKERRIT.

July 3d.

THE prisoners were jointly indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession.

It was proved, that the prisoner Eliza Skerrit went into the shop of James George, and there purchased a loaf, for which she tendered a counterfeit shilling in payment, he secured her, but no more counterfeit money was found on her. The other prisoner, who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen other bad shillings were found on her, wrapped in gauze paper. James George, after the prisoners were secured, put the counterfeit shilling uttered by Eliza Skerrit, into a packet with the fourteen others; and, in his cross examination, he stated, that he could not swear which was the *particular piece of money* that was uttered, but he was sure that the fifteen pieces of counterfeit coin produced by him, consisted of the one utt-

If two prisoners are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession; it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of money are proved to be counterfeit; and if it appear that the two prisoners went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed

outside the shop, having other bad pieces of money, both may be convicted; the uttering and the possession being both joint.

1826.
 REX
 v.
 SKERRIT.

ed by Eliza and the fourteen afterwards found on Priscilla; the whole fifteen were proved to be counterfeit.

Carrington, for the prisoners, objected; 1st., that it was incumbent on the prosecutor to shew what identical piece of counterfeit money was uttered by the prisoners, and to shew with certainty some other identical piece of counterfeit money, which they had in their possession; and that, in this case, an identification of the particular piece uttered was necessary, in the same way as, in a case of uttering a forged note, it was necessary to show the very note uttered, or in a prosecution for a libel to show the identical libel published, and not another unpublished copy, which might be found on the prisoner. And 2dly, he objected, that the complete offence was not proved against either of the prisoners; as the one who uttered the piece of money had no other counterfeit coin in her possession, and the other who had the coin, was not guilty of any uttering. It might be said, that the one who stayed outside the shop, was guilty of a joint uttering with the other who was in it; like the case of two thieves, one inside the shop and the other outside; but the case of the thieves differed from the present in this respect, *viz.* that the thief outside might be there to co-operate, by the removal of the stolen property or the like. Now the prisoner Priscilla Skerrit, by staying outside the shop, could not by possibility be considered as aiding her sister in the act of paying for a loaf inside the shop. And in the case of *Rex v. Else* (a), it was held, that if one person utter a bad piece of money, having no more, in conjunction with another, who had more bad money, but who was absent, and did not utter, neither was guilty of this offence: however, in that case, the persons were much further asunder than the prisoners had been in the present.

GARROW, B.—With regard to the second objection, I think that the two prisoners coming together to the shop,

(a) Russ. & Ry. C. C. R. 142.

1826.

 Rex
 v.
 SKEBBIT.

and the one staying outside, they must both be taken to be jointly guilty of the uttering; and it will be for the Jury to say, whether the possession of the remaining pieces of bad money was not joint. The first objection, although it carries with it an appearance of considerable weight, seems to me also to be not well founded. The indictment charges that they uttered one piece of counterfeit money, having one other in their possession. Now we have evidence that they had originally fifteen pieces of bad money, one they uttered: it certainly cannot be shewn, which of the fifteen it was that they uttered; but if it was *either* of those pieces, they must have been guilty of uttering one piece of counterfeit coin, having another piece in their possession, which is exactly what they are charged with. If among the whole number of pieces, there had been but one single piece of good money, the objection would have been unanswerable; because then the good piece *might* have been the one uttered. In the present case, I must over-rule the objection.

Verdict—Guilty.

Taunton and *Shepherd*, for the prosecution.

Carrington, for the prisoners.

[Attornies—*Chippendale*, and *Frankum*.]

By the stat 15 Geo. 2, c. 28, s. 3, it is enacted, "that if any person whatsoever shall utter or tender in payment any false or counterfeit money, knowing the same to be false or counterfeit, to any person or persons, and shall, either the same day, or within the space of ten days then next, utter or tender in payment any more or other false or counterfeit money, knowing the same to be false or counterfeit, to the same person or persons, or to any other person or

persons, or shall, at the time of such uttering or tendering, have about him, or her, in his or her custody, one or more piece or pieces of counterfeit money, besides what was so uttered or tendered, then such person so uttering or tendering the same shall be deemed and taken to be a common utterer of false money, and being thereof convicted, shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more,

1826.
 REX
 v.
 SKERATT.

to be computed from the end of the said year; and if any person having been once so convicted as a common utterer of false money shall afterwards again utter or tender in payment any false or counterfeit money, to any person or persons, knowing the same to be false or counterfeit, then such person being thereof convicted,

shall, for such second offence, be and is hereby adjudged to be guilty of felony without benefit of clergy.

By the 5th sect. of the same statute, the prosecution must be commenced within six months after the offence committed. See the modern cases on this subject collected in Carr. Supp. C. L. 219.

WORCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. BARON GARROW.

July 13th.

Ejectment
 does not lie for
 dower which has
 not been as-
 signed.

DOE, on the demise of NUTT, Widow, *v.* NUTT.

THIS ejectment was brought by the lessor of the plaintiff, who was the widow of a person who had been seised in fee of the premises in question. She, in the first instance, relied on her husband's will in her favour; but, in answer to this, the defendant shewed a conveyance in fee by the husband, in his life-time, to him.

Campbell, for the lessor of the plaintiff. — I submit, that as the husband could only convey, subject to his wife's inchoate right to dower, we are still entitled to recover one-third of the estate.

GARROW, B. — I am clearly of opinion, that an ejectment does not lie for dower before it is assigned.

Nonsuit.

Campbell and *Godson*, for the lessor of the plaintiff.

Russell, for the defendant.

[Attornies—*Croad*, and *Holdsworth*]

Ejectment can only be maintained where the party has a right of entry; and if such party either has no right of entry, or it has been tolled, an ejectment cannot be supported. Lord *Coke* says, 1 Inst. 32(b) "This great disadvantage the wife hath, that she cannot *enter* into her dower by the common law, but is driven to her writ of dower to recover the same."

The mode of recovering dower *at law* is by a writ of dower *unde nihil habet*, or by a writ of right of dower; but, if either of these remedies is resorted to, the writ of dower *unde nihil habet* is much to be preferred, because, by the stat. of Merton, the dowress recovers damages for the non-assignment of her dower, which damages may be assessed either by the Jury trying the case, or on a writ of inquiry. Ca. Temp. Hard. 19. In Jenk. Cent. 1, Ca. 85, it is laid down, that, "Regularly, where a husband *die seised*, the wife shall recover her dower with damages, for the whole time after her husband's death, but, if he does not *die seised*, after her demand, and the tenant's refusal to assign her dower, she shall recover damages from the time of the refusal." However, in 1 Inst. 32(b), Lord *Coke* says, "It is necessary for the wife, after the decease of her husband, as soon as she can, to demand her dower, before good testimony; for, otherwise, she may, by her own default, lose the value after the decease of her husband, and her damages for detaining of her dower; for if she bring a writ of dower *against the heir*, and the heir cometh into

the Court upon the summons on the first day, and plead that he has been always ready, and yet is, to render dower, &c. if the wife hath not requested her dower, she shall lose the mesne values and her damages; but if she hath requested her dower, she may plead it, and issue may be thereupon taken." And the case of *Dobson v. Dobson*, Ca. Temp. Hard. 19, and 2 Barnard. K. B. 180, accords with that. "The damages in these cases are according to the value, not of the land, but of the rent." Hale, MSS. Co. Litt. 32(b) note 5.

If the demandant recovers damages in a writ of dower *unde nihil habet*, she recovers costs; but if no damages are recovered, she is not entitled to costs, 2 Wms. Saund. 45. The learning on this subject will be found at large in 2 Wms. Saund. 42 *m*, *et seq.*, and the Precedents in 3 Chitty Plead. tit. Proceedings in Dower. In a writ of right of dower, no damages are recoverable. Co. Litt. 32(b). These are the modes of recovering dower *at law*.

In equity, bills are filed by dowresses to obtain their dower; but, to avoid objection to the jurisdiction, it is prudent also to pray a discovery of deeds or the like. That was so in the case of *Moor v. Black*, Cas. Temp. Talb. 126; and Lord Chancellor Talbot compelled the discovery and the assignment of dower. In the case of *Curtis v. Curtis*, 2 Bro. Ch. Ca. 620, where the title to the dower was denied, the Lord Chancellor *Bathurst*, ordered the bill to be retained, with liberty to the plaintiff to try her right to dower

1826.

Doe
v.
Nutt.

1826.

DOE

v.

NUTT.

at law; and the widow having established her right at law, Lord *Alvanley* decreed her the relief prayed. In the case of *Mundy v. Mundy*, 2 Ves. junr. 129, Lord

Loughborough lays down, that if a legal title, such as dower, is controverted, it must be made out at law; but a Court of Equity will act in aid of the title.

July 13th.

POWELL and Wife v. HODGETTS, CUTLER, CHETWYN, and UNDERHILL.

If A. imprison B., and, in continuation of that imprisonment, A. deliver B. into the charge of C., who keeps B. in custody, the acts and declarations of C. are evidence against A., in an action for false imprisonment.

ASSAULT, and false imprisonment: Plea—Not Guilty.

It appeared that the defendants, Cutler and Chetwyn, seeing the plaintiff's wife digging potatoes in a field, went up to her, saying, that she had no right to dig there; they then took her into custody, and delivered her over to the defendant Underhill, who was a constable, by whom she was detained for two days, and then allowed to depart.

The plaintiff's counsel proposed to give evidence of the declarations of the defendant Underhill.

Ludlow, for the defendants.—I submit, that as the plaintiff has proved a distinct imprisonment as against Cutler and Chetwyn, he can only recover as against them; and that being so, he cannot go into any thing that is either said or done by Underhill in their absence.

C. Phillips, and *Godson*, *contra*, argued, that they were at liberty to go through the whole of the facts of the imprisonment, as long as the imprisonment continued, although they could only recover against particular parties.

GARROW, B.—It is quite clear, that a plaintiff who brings an action for false imprisonment, against several defendants *jointly*, may either recover against *all* for any joint act of imprisonment committed by the whole of them, or may give evidence of an act of imprisonment committed by one, two, or more of the number, and recover against such defendant or defendants only; but it has been truly stated

1826.

POWELL.

HODGETTS.

by the counsel for the defendants, that if a plaintiff proves a distinct imprisonment by two only of the defendants, he cannot go on, after that, to affect the others, and recover against the whole number; and for this reason, the damages being joint against all, the latter defendants would be liable to pay for an act, with the commission of which they had nothing to do. I therefore think, in the present case, that the plaintiff, having proved a distinct imprisonment by Cutler and Chetwyn, cannot recover against either of the others: but I think the acts and declarations of Underhill are evidence in this way. The defendants Cutler and Chetwyn, when they had themselves taken and imprisoned the plaintiff's wife, delivered her over to Underhill. Now that was a mere continuation of the imprisonment by them, and being so, I am of opinion, that the acts and declarations of Underhill are evidence against them; and I take it, that, in all cases, where one person puts a party into the custody of another, what is said and done by that other, is evidence against the person placing the party in custody, though said or done in his absence.

The evidence was received.

Verdict for the plaintiffs, against Cutler and Chetwyn,—Damages, 10%.

Verdict for the defendants, Hodgetts and Underhill.

C. Phillips, and *Godson*, for the plaintiffs.

Ludlow, for the defendants.

[Attornies—*Elkington*, and *Hayes*.]

See the case of *Wright v. Court*, ante, p. 232.

STAFFORD ASSIZES.

(Crown Side.)

BEFORE MR. BARON GARROW.

July 15th.

REX v JAMES HASSALL and SARAH HASSALL.

If a man and woman be jointly indicted for a larceny, the latter as a *single woman*;—it is not sufficient to entitle her to an acquittal on the ground of coercion, to prove both jointly committed the offence, and that she had lived with the man for two years, and was reputed his wife; but such evidence must be given as to satisfy the Jury that the prisoners are in fact married persons, although it is not absolutely necessary to prove the actual marriage of the parties.

THE prisoners were indicted (the latter as a single woman) for stealing a 20*l.* bank note, and a 5*l.* bank note, the property of Edward Fetherstone. It appeared, that the prosecutor met the two prisoners on the road leading to Wolverhampton, and after proceeding a short distance, the prosecutor and the female prisoner retired together into an adjoining field, where the prosecutor had an improper connexion with her. The male prisoner, who was spoken of both by the prosecutor and herself as her husband, waiting all the while in the road. On their return, the prosecutor said, that, on their return, he “paid *the husband* a shilling, which was his charge.” The parties, after that, supped together; and the prosecutor lost his money, of which the 5*l.* note was found on the male prisoner, and the 20*l.* note on the female. On the cross-examination of the prosecutor, and the constable who apprehended them, it appeared that the prisoners, during the time they were seen by those witnesses, spoke of and treated each other as husband and wife; but those witnesses never saw them, except on the present transaction.

For the prisoners, a witness was called, who had known them for two years, and he proved, that during that time they lived together, and passed as husband and wife, and were reputed to be so. But this witness stated, on his cross-examination, that he did not know when or where they had been married.

Carrington, for the prisoners, contended, that on this

1826.

REX

v.

HASSALL.

evidence the female prisoner must be acquitted. The proof was clear that the felony was committed by them jointly; and if this evidence adduced was sufficient proof that they were husband and wife, the female prisoner, as the wife, was entitled to be acquitted, on the ground of coercion. In the case of *Morris, Esq. v. Miller, Esq. (a)*, it was laid down by my Lord *Mansfield*, that the only cases in which it was necessary to prove an actual marriage, were prosecutions for bigamy, and actions for criminal conversation; and that, in all other cases, evidence of reputation and cohabitation were sufficient presumptive proof of marriage.

GARROW, B.—These parties are not indicted as husband and wife; and I think, under the whole of the circumstances of this case, that the evidence of the marriage is by no means sufficient. I quite agree with my Lord *Mansfield*, that the two cases mentioned are the only cases in which it is necessary to give direct proof of an *actual* marriage; but it should be observed, that what evidence would be sufficient in other cases was not the point directly to be determined in the case of *Morris v. Miller*. Indeed, if the doctrine now contended for by the learned counsel were to prevail, it would be a never failing recipe for all the hedge-tinkers about the country; for, without passing themselves off as being married, such persons would hardly find admission into the meanest lodging-house in the kingdom. And I take it, that though, in cases of this kind, it is not absolutely necessary to give direct proof of an actual marriage, yet such evidence must be adduced as to satisfy the Jury that the parties are in fact husband and wife, in the same way as to convince them of any other fact which they are to find. With regard to the evidence in the present case, the testimony of the constable and the prosecutor is only that of two

(a) 4 Burr. 2058.

1826.
 }
 REX
 v.
 HASSALL,

strangers, who are wholly ignorant on the subject ; and the other witness only proves, that these two persons, of whose morals we have had a specimen, were living together, and thought proper to pass as husband and wife. If the parties, however, be really married, and will make a proper application to the Secretary of State, supported by proof of the marriage, they will sustain no injury by the want of evidence before me.

Verdict—Guilty.

Male, for the prosecutor.

Carrington, for the prisoners.

[Attornies— ———, and *Passman*.]

The case of *Morris*, Esq. v. *Miller*, Esq. 4 Burr. 2057, was an action for criminal conversation with the plaintiff's wife, and the *actual* marriage of the plaintiff's wife could not be proved; a verdict was found for the plaintiff: and a motion had been made to enter a nonsuit on that ground: Sir *Fletcher Norton* and Mr. *Stowe*, on shewing cause, said, "We proved articles between the man and his wife, made after marriage, for the settling of the wife's estate, with the privity of relations on both sides; we proved *cohabi-*

tation, name, and reception of her by every body as his wife, though we did not indeed prove it by any register, or by witnesses who were present at the marriage. In ejectment, four months ago, before Lord *Mansfield*, this sort of evidence was offered and received." Lord *Mansfield*.—"It certainly may be done so in all cases except two. One is in prosecutions for bigamy, and this case is the other." If the female prisoner had been indicted as the wife of James Hassall, no evidence of the marriage would have been necessary.

July 17th.

REX v. THOMAS ABGOOD and Others.

An indictment charging that a prisoner "did feloniously and

maliciously with intent to extort money, *charge and accuse* A. B. with having committed the horrible and detestable crime, &c. and feloniously, &c. menace and threaten to prosecute the said A. B. &c." is not good under the stat 4 Geo. 4, c. 54, s. 5.

But if the indictment follow the statute, and the evidence be of a threat to prosecute, the Judge will leave it to the Jury to say, whether that was not a threatening to accuse.

THE indictment stated, that the prisoners "did feloniously and maliciously, with intent to extort money, *charge*

and accuse Joseph Nock, with having committed the horrid and detestable crime, &c. not to be named, &c. with a certain mare, and did feloniously and maliciously, with intent to extort, &c. menace and threaten to *prosecute* the said Joseph Nock for the said pretended offence.

1826.
 Rex
 v.
 ABGOOD.

Ludlow, for the prisoners.—I submit, that the charge and accusation alleged to have been made by the prisoners, and the threat to *prosecute* on that charge, are not an offence within the terms of the stat. 4 Geo. 4, c. 54, s. 5. It is not within the words of that act of parliament, and is in substance a different offence. That act of parliament applies only to threatening to *accuse* prospectively, and not to a threat to *prosecute*, a charge or accusation which had antecedently been made.

GARROW, B., (having conferred with BURROUGH, J.)—My learned brother and myself are both of opinion, that this objection must prevail. If the indictment had followed the terms of the statute, and it had been proved that the prisoners threatened to *prosecute* Mr. Nock, I should have left it to the Jury to say, whether that was not a threatening to accuse him; but we think, that the offence laid in this indictment is not sufficiently charged under the statute. The prisoners must therefore be acquitted.

Verdict—Not Guilty.

Corbet and Talfourd, for the prosecution.

Ludlow and Whateley, for the prisoners.

[Attornies— ———, and ———.]

By the stat. 4 Geo. 4, c. 54, s. 5, it is enacted, that "if any person shall maliciously threaten to accuse any other person of any	crime punishable by law with death, transportation, or pillory, or of any <i>infamous crime</i> , with a view or intent to extort or gain
---	---

1826.
 }
 REX
 v.
 ASGOOD.

money, security for money, goods or chattels, wares or merchandize, from the person so threatened, or shall procure, counsel, aid or abet the commission of the said offences, or of any of them, every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for such term not less than seven years, as the Court shall adjudge, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years. And by the stat. 6 Geo. 4, c. 19, it is enacted, "that as well every crime now by law deemed infamous, as also every assault with intent to commit any rape, or the abominable crimes of sodomy or buggery, or either of those crimes, and every attempt or endeavour to commit any rape, or the said abominable

crimes, or either of them; and also every solicitation, persuasion, promise, threat, or menace, offered or made to any person, whereby to move or induce such person to commit, or to permit the said abominable crimes, or either of them, shall be deemed and taken to be an infamous crime, within the meaning of the stat. 4 Geo. 4, c. 54."

This latter statute passed in consequence of the decision in *Hickman's* case, in which it was held, by the twelve Judges, that the making of overtures to commit sodomy was not, before this act, an infamous crime, because it did not subject the party to an infamous punishment, or prevent his being a witness.

Having been engaged in the Civil Court at the time this case was tried, we are indebted for this note to the kindness of one of the counsel in the cause.

July 17th.

THE APOTHECARIES' COMPANY v. FERNYHOUGH.

If an instrument has been originally unstamped, but has been stamped on payment of the penalty; it is admissible in evidence, though the receipt for the penalty has been erased; provided it be proved that such receipt had been indorsed on it.

It is not necessary to prove the commissioner's signature to such a receipt.

DEBT for penalties, for practising as an apothecary, without a certificate from the Apothecaries' Company.

The practising was proved. The defence was, that the defendant was in practice on the 1st of August, 1815.

To prove this, articles of copartnership, between the defendant and an apothecary, named Sutton, executed on the 1st of June, 1815, were offered in evidence; these articles of copartnership, had not been originally stamped, but they had since been stamped at the Stamp Office, on

ayment of the penalty. It was proved, that they were sent to London for the purpose of being stamped, and were sent back stamped, and with the receipt for the penalty indorsed; but when the deed was put in, something that had been written on it, had been evidently erased, and no receipt for the penalty appeared.

It was stated, that the defendant had himself, incautiously, erased the receipt.

Taunton, for the Company, objected, that this instrument was not admissible in evidence, for, by the terms of the stamp acts, instruments before inadmissible in evidence, for want of a stamp, were rendered admissible by the stamp being affixed, and *the receipt for the penalty being produced*. Now, as in this case no such receipt was produced, the instrument was not receivable in evidence. He further objected, that even if the receipt did appear on the back of the instrument, the handwriting of the signature of the commissioner of the stamps should be proved.

BURROUGH, J.—If there is proof that there was a receipt for the penalty, and for any sufficient reason it cannot be produced, I am of opinion that secondary evidence of it may be given; and in the present case, after the evidence that has been given relative to the receipt, I shall admit the articles of copartnership in evidence. As to the proof of the commissioner's signature to such a receipt, I have never heard it asked for, in the great number of years I have been connected with Courts of justice.

The evidence was received.

Verdict for the defendant.

Taunton, Russell, and *Field*, for the Company.

Jervis, Campbell, and *J. Jervis*, for the defendant.

[Attornies—*Hore & Bacot*, and *Bedson & Co.*]

1826.
APOTHECARI-
ES' Co.
v.
FERNY-
HOUGH.

1826.

SHROPSHIRE ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE BURROUGH,

(Who sat for Mr. Baron Garrow.)*

DOE on the demise of LLOYD v. PASSINGHAM.

It is no objection to a will more than thirty years old being read in evidence, that possession has not followed it, because the court cannot know how the will directs the possession to go, till it is made acquainted with the contents of the will, by its being read.

If, in the year 1794, the present defendant in ejectment obtained a verdict for the premises in question; and the present lessor of the plaintiff (who was neither a party to that trial, nor claiming under anyone who was so,) introduce what passed at that trial, and go on to shew that the verdict then proceeded on improper evidence; after this, the now defendant may give evidence of what deceased witnesses proved at that trial, with a view of shewing that that verdict was a correct one.

EJECTMENT to recover one moiety of the manor and estate of Hendwr in the county of Merioneth. This property had belonged to Gwin Lloyd, Esq. in fee, and the question really to be tried was, whether Mrs. Passingham, the mother of the defendant, Colonel Passingham, was the legitimate daughter of Gwin Lloyd.

The case as opened on the part of the lessor of the plaintiff, was this, that Gwin Lloyd, having married a lady named Hill, died without any *legitimate* child, and that, on his decease, his estates passed to his sisters Catherine and Mary Lloyd in fee. The present ejectment was brought to recover the moiety which had belonged to Catherine Lloyd; who died in the year 1789, and by her will devised the property in question to her sister Mary Lloyd for life, with remainder to John Lloyd for life, with remainder to his eldest son (the lessor of the plaintiff) in tail. After the decease of Catherine Lloyd, her sister Mary Lloyd was in possession of the whole estate; and she so continued till the year 1794, when an ejectment, in which the present defendant was lessor of the plaintiff, and Mary Lloyd defendant, was brought to recover the whole of the manor and estates of Hendwr, Colonel Passingham then claiming to be the legitimate grandson of Gwin Lloyd. At the trial of that ejectment, a register of Fleet marriages was produced, by which it appeared, that Gwin Lloyd had

* Who had formerly been counsel in a case involving the same question.

married a person named Elizabeth Taylor; and also the examined copies of two entries from the parish registers of the parish of St. Pancras, one of which purported to contain the entry of the burial of Elizabeth Taylor, under the name of Lloyd, and the other, the entry of the baptism of Elizabeth, the daughter of Gwin and Elizabeth Lloyd. This Elizabeth, the daughter of Gwin and Elizabeth Lloyd, was the same person who afterwards married Mr. Passingham, and was the mother of the now defendant Colonel Passingham. On the trial of that case at Shrewsbury, before Mr. Justice *Heath*, at the Summer Assizes of 1794, a verdict was found for the lessor of the plaintiff, the Jury thereby finding in favor of the legitimacy of Colonel Passingham. A short time before Michaelmas Term, 1794, a deed was executed by Mrs. Mary Lloyd, Mr. John Lloyd, Colonel Passingham, and his brother, Mr. Robert Passingham, by which, (after reciting that Colonel Passingham's legitimacy had been established by the verdict), the two former, for certain considerations therein stated, confirmed the manor and estates to Colonel Passingham, who had continued in possession of them down to the present time. John Lloyd died in the year 1825, and the title of the lessor of the plaintiff then accruing, the present ejectment was brought. The lessor of the plaintiff now contended, that, at the trial in 1794, the Fleet register was improperly admitted in evidence,—that the two entries in the registers of St. Pancras were forged, and that the mother of Colonel Passingham was not the legitimate daughter of Gwin Lloyd.

1826.
DOE
d.
LLOYD
v.
PASSINGHAM.

For the lessor of the plaintiff, who claimed as the devisee of Catherine Lloyd, her will was tendered in evidence. It was dated 7th February, 1785.

Copley, A. G., for the defendant. — The execution of this will must be proved; I admit that it is more than thirty years old; but the case of Lord *Rancliffe v. Par-*

1826.
 }
 DOR
 d.
 LLOYD
 v.
 PASSINGHAM.

kins (a), only decides that the possession under a will more than thirty years old, renders it unnecessary to prove the execution of the will by witnesses. Now here, I contend, that the possession was not under the will, for the estate has been in the possession of Colonel Passingham; and besides that, it is opened that an agreement was entered

(a) 6 Dow, 202. In this case, Lord Eldon, in giving judgment in the House of Lords, speaking of the will of Sir T. Parkyns, made in 1735, says, "there is a circumstance with respect to the attestation, which deserves to be attended to; for your Lordships know, that it is necessary that the three witnesses should sign in presence of the testator. They state here, that the testator signed it in their presence, but not that they signed in presence of the testator. But if it is proved, that they did actually sign in the presence of the testator, the not recording that circumstance will not vitiate the will; but when the will is produced in a Court of justice, it is necessary that the proof should be made; and if it were necessary for the decision of the question, it would be sent to a Court of law, *where a will, thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself.* But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing,

though it should not be recorded."

In the case of *McKenire v. Frazer*, 9 Ves. 5, a will was, by its date, more than thirty years old, and the testator had been dead more than twenty years. It had been proved on his death, and not since acted on. The handwriting of two of the witnesses was proved, but no account could be given of the third. Sir William Grant, M. R., said, "I do not see how a will can be distinguished from a deed, only that the former, not having effect till the death, wants a kind of authentication, which the other has. That is from the nature of the subject; but I think the proof sufficient in this case."

In the case of *Calthorpe v. Gough*, heard at the Rolls, 1789, 4 T. R. 707 (n. b), and 709 (n. t), the will was not proved by witnesses: and it was said at the bar, that it was not necessary that it should be proved, it being above thirty years old; and the counsel mentioned a case of *Machery v. Newbolt*, in which Sir Lloyd Kenyon, M. R. decided, that a will, above thirty years old, should be read without proof, although the testator had died very recently. The point, however, was not decided in the case of *Calthorpe v. Gough*, because the heir at law admitted the will.

into, by which it was admitted, that Catherine Lloyd's possession was a possession by wrong.

1826.

Don

d.

LLOYD

v.

PASSINGHAM.

Russell, on the same side.—The agreement opened admits the possession of Catherine Lloyd to be wrongful, and our objection is, that if you propose to read a will, without calling the subscribing witness, you must shew possession in conformity with it. Now here, Mary Lloyd had only a possession for five years, which, by the agreement, she admits to have been a wrongful one.

Tamton, contra.—How is it to be shewn that the possession has not gone under the will? Unless the will be read, you cannot say how it directs the possession to go. If the will is thirty years old, and comes from a proper repository, I take it, that it is not necessary to call any attesting witness; but supposing that it were necessary, and that the opening on the part of the lessor of the plaintiff is to be taken as correct, even then it stands thus: Catherine Lloyd left the property to Mary Lloyd and others for life, and then, under that disposition, Mary Lloyd is in possession for five years; that was a possession under the will; and neither she nor John Lloyd, the next tenant for life, could, by any act of their's, prejudice the remainder-man, and if it were otherwise, tenants for life, for a sum of money, might give up the possession, and the remainder-man be barred.

Campbell on the same side.—We appear for the lessor of the plaintiff, whose title did not accrue till the year 1825, and the question now is, whether the will of Catherine Lloyd can be read. It should be observed, that the defendant's possession is not adverse to the will, because he was let into possession by those who took under it; and if a uniform possession under a will were necessary, a will would never be of any use, as the party, instead of wanting to prove his title to support an ejectment, would

1826.
 }
 Doe
 d.
 LLOYD
 v.
 PASSINGHAM.

be in possession of the estate. The question in the present case stands thus: the tenants for life, under this will, agree among themselves to let Colonel Passingham into possession, that they do by the deed; his possession being only under them, is still a possession under the will. It is clear, that as long as they lived, the possession of the defendant is only their possession, and he is in as their assignee.

Taunton.—One fact appears to be decisive. In the deed of compromise it is stated, that Catherine Lloyd devised the estates, and the defendant thereby admits the will, and then takes a conveyance from two of the devisees under it.

The Attorney-General.—A will thirty years old does not prove itself, unless possession has followed it. The part of the deed last alluded to by Mr. *Taunton*, only states that Catherine and Mary Lloyd entered on the estates as coheiresses of Gwin Lloyd, and that whereas Catherine made her will, and, considering herself coheiress, devised to Mary Lloyd and John Lloyd as therein mentioned. There is nothing here to shew that possession followed the will; indeed, at Catherine Lloyd's decease, Mary might have entered as heiress at law.

BURROUGH, J. —The law appears to be laid down very strangely. After the will is read, it may be seen whether possession followed it, but that can hardly be known till it is read. Indeed, I don't see how the question can be raised, whether the possession of the estate has followed the will, till the Court is made acquainted with the contents of the will, by its being read; therefore, it must be read.

The will was read.

The counsel for the lessor of the plaintiff then proceeded to shew what had occurred at the former trial.

Evidence was given that the *Nisi Prius* record of the trial in 1794 had been searched for at the office of the Associate of the Circuit, (which was considered as the office where it would remain), but that no judgment having been entered up by reason of the compromise, it could not be found.

1826.
 {
 Doe
 d.
 LLOYD
 v.
 PASSINGHAM.

Mr. Pownall, who was attorney for Mrs. Mary Lloyd, the defendant on that trial, put in the issue delivered in that cause: and

Mr. Sandys, the then attorney of Colonel Passingham, being examined on the part of the lessor of the plaintiff, stated, that on the trial in the year 1794, two papers were proved and read, which purported to be examined copies of entries in the parish registers of St. Pancras, of the baptism of Elizabeth, the daughter of Gwin Lloyd, and of the burial of Elizabeth Lloyd, the supposed wife of Gwin Lloyd.

The *Attorney-General* wished to ask him, whether, on that trial, Mr. Emanuel Williams, who was a witness for Colonel Passingham, did not depose to a declaration made by Gwin Lloyd, relative to the legitimacy of Colonel Passingham's mother.

Taunton, for the lessor of the plaintiff. — I must object to what deceased witnesses proved at the former trial being given in evidence now. That case was not between the same parties; for it was between Colonel Passingham and Mary Lloyd, who was a tenant for life; and the present case being between a remainder-man and Colonel Passingham, the evidence of deceased witnesses given on the former trial is not admissible now.

Campbell. — If the lessor of the plaintiff was either party or privy, the evidence would be admissible; but our client was clearly not a party, nor is he a privy, as he does

1826.
 Don
 d.
 LLOYD
 v.
 PASSINGHAM.

not take by descent, but as a purchaser. Mary Lloyd was a mere tenant for life, and the lessor of the plaintiff has a distinct estate. Where the record would not be evidence, statements like the present would not; and the record is only admissible against parties or privies.

The *Attorney-General, contra.* — If we are not entitled to go into what took place on the former trial, the greatest injustice will follow. The other side introduce the former trial for their own purposes, and while they impeach the former verdict by shewing certain bad evidence, on which they say it proceeded, they would shut out the other evidence, which would explain and support the finding of that Jury. I will take it, that we cannot give evidence of the former trial, unless the record would be evidence. But in cases where two parties claim under the same deed, a record, which is for or against one remainder-man, is evidence for or against another remainder-man claiming under the same deed. This was held in the case of *Pyke v. Crouch* (a); and it is so laid down in Com. Dig. tit. Evidence (A. 5)(b): and I therefore contend, that the lessor of the plaintiff is privy in estate to Mary Lloyd and John Lloyd, because they all claim under the same deed.

Russell. — The counsel for the lessor of the plaintiff opens, that there was a former trial, and that the verdict was then found on improper evidence, and he goes into proof of that:

(a) 1 *Ld. Raym.* 730, it was resolved, on a trial at bar, that, "if several estates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainder-man, in an action brought against him for the same land, though he does not claim any estate un-

der the first remainder-man, because they all claim under the same deed."

(b) It is there stated, that a verdict for him in remainder shall be evidence for a subsequent remainder-man in the same deed; for though he does not claim under him for whom the verdict was, yet he claims by the same deed. And for this, 1 *Ld. Raym.* 730, is cited.

now, that must create a very unfair prejudice, unless we go into the whole of what appeared at that trial.

1826.

Doe

d.

LLOYD

v.

PASSINGHAM.

BURROUGH, J.—You cannot cross-examine Mr. Sandys as to the whole of the evidence given on that trial, as all the witnesses may not be dead.

Russell. — We should be able to get at the whole of the evidence by giving this sort of proof as to the evidence of those who are dead, and by calling the living ones to give evidence now.

Taunton, in reply. — We tender the evidence of the papers produced at the former trial, as of an act done by Colonel Passingham, who is the defendant on the present record; but our doing so does not let the other side into giving evidence of all his other acts. As to the other point, the case of *Pyke v. Crouch* goes only to this, that, between two successive remainder-men, a verdict for or against one is evidence for or against the other. But there is a great difference between the evidence of a deceased witness and a verdict; and there is also the greatest difference between the case of one remainder-man in tail and another, and the case of a tenant for life and a remainder-man. The latter can, by no act of his own, destroy the remainder, while the former, by levying a fine, or suffering a recovery, can get the whole interest, and bar the other remainders.

BURROUGH, J.—I think there is very great difficulty in the question, but I shall receive the evidence. At the former trial, Colonel Passingham was lessor of the plaintiff, and produced the witness, Emanuel Williams, in support of his title. His possession is now attacked; and the other side introduce the former trial, to shew that at that time a verdict was improperly obtained. As they have introduced a part of the evidence given at the former trial,

1826.
 Doe
 d.
 LLOYD
 v.
 PASSINGHAM.

I must allow Mr. Sandys to be asked what the deceased witness then said on his oath.

The evidence was received.

On the part of the defendant, the settlement made by Gwin Lloyd on his marriage with Miss Hill, was put in. This settlement was dated on the 12th March, 1746, and was between Gwin Lloyd of the first part, Sarah Hill of the second part, Sir Rowland Hill and John Gwynne, of the third part, and Sir Watkyn Williams Wynne, and Edward Lloyd, of the fourth part. By this settlement, which recited the intended marriage, the manor and estates in question were conveyed to Sir Watkyn Williams Wynne and Edward Lloyd in fee, "To have and to hold the same (after various limitations not material to this case) unto the said Sir W. W. Wynne and Edward Lloyd, their heirs and assigns, *to the only proper use and behoof of the said Sir W. W. Wynne and Edward Lloyd, their heirs and assigns, to the use of the said Gwin Lloyd, his heirs and assigns for ever.*"

The defendant's counsel contended, that, under the terms of this settlement, Gwin Lloyd was only seised, at the time of his decease, of an equitable estate, the legal estate being in the trustees.

This point was reserved, the learned Judge giving no opinion upon it; and the case proceeded upon the simple question of the legitimacy of Colonel Passingham.

Verdict for the lessor of the plaintiff.

Taunton, Campbell, and Richards, for the lessor of the plaintiff.

The *Attorney-General, Russell*, and *E. V. Williams*, for the defendant.

[Attornies—*Pownall*, and *Rowke*.]

In the ensuing Michaelmas Term, *Russell* moved for leave to enter a nonsuit, on the ground, that, under the marriage settlement, executed before the marriage of Gwin Lloyd with Miss Hill, he was only seised of an equitable estate; but none of the points ruled by the learned Judge at the trial were questioned.

1826.
Doe
d.
LLOYD
v.
PASSINGHAM.

The Court granted a rule *nisi* on that point.

GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE BURROUGH.

REX v. WILLIAM SMITH, THOMAS SMITH, and SARAH SMITH.

THE first count of the indictment stated, "that the defendants, unlawfully and maliciously contriving and intending to hurt and injure one George Smith, *being an idiot, and under the care, custody, and control* of the said William Smith, Thomas Smith, and Sarah Smith, on the first day of January, 1825, and on divers other days, &c. with force and arms, at, &c. in and upon the said George Smith, then and there being such idiot, and under the care, custody, and control of the said W. S., T. S., and S. S., as aforesaid, *did make divers assaults*; and that the said W. S., T. S., and S. S., during all that time, at, &c. cruelly, unnecessarily, maliciously, and unlawfully, did *keep, confine, and imprison* the said George Smith, so being an idiot, and under the care, custody, and control of the said W. S., T. S., and S. S., in a certain dark, cold, and unwholesome room, part and parcel of a certain dwelling-house, in the parish, &c. and during all that time, did

There is no legal obligation on one brother to maintain another, so as to make the omission indictable.

If one has his idiot brother, who is helpless, as an inmate in his house, and omits to supply him with proper food, warmth, &c. he is not indictable for the omission.

If one has an idiot brother, who is bed-ridden in his house, and keeps him in a dark room, without sufficient warmth or clothing, this will not be an assault, or an im-

prisonment, nor will proof of this support an indictment for an assault or an imprisonment.

1826.
 {
 Rex
 v.
 Smith.

cruelly, unnecessarily, maliciously, and *unlawfully neglect and refuse* to give and administer, or permit to be given and administered to him the said George Smith, being so confined and imprisoned as aforesaid, sufficient meat, drink, victuals, clothes, and other necessities proper and requisite for the sustenance, support, maintenance, and clothing of the body of him, the said George Smith, and did *then and there keep the said George Smith, without sufficient and proper air, warmth, and exercise,* necessary for the health of the said George Smith; by means of which said confinement and imprisonment, and also for want of such sufficient meat, drink, victuals, clothes, and other necessities, warmth, air, and exercise, as were proper and requisite for the sustenance and support, &c. of the said George Smith; he, the said George Smith, on, &c. at, &c. became, and was for a long time, to wit, &c. weak, sick, ill, &c. and other wrongs, &c. against the peace, &c."

The second and third counts were similar, except that the former stated George Smith to be "a lunatic," and the latter, "a person of unsound intellect."

The fourth, fifth, and sixth counts were precisely similar to the first, second, and third, except that they stated George Smith to be "in the care, custody, and control of William Smith."

The seventh, eighth, and ninth counts, were like the fourth, fifth, and sixth, except that they omitted the allegation, that George Smith was "in the care, custody, and control of William Smith," and did not state that he was in the care of any person.

The tenth count was for a common assault. Plea—General issue.

Taunton, for the prosecution, opened, that he was not in a condition to prove an actual assault by beating, but he should shew gross mal-treatment; and it had been held, that exposure to the inclemency of the weather, and other ill treatment of that sort, was sufficient to support an in-

dictment for an assault; and he cited the case of *Rex v. Ridley (a)*.

1828.
Rex
v.
Smith.

From the evidence on the part of the prosecution, it appeared, that George Smith, who was upwards of forty years of age, had always been an idiot, and had been bed-ridden for some years; and that his father, at his decease, had left him an annuity charged on his real property. The defendants were the brothers and sister of George Smith; and in consequence of some information, the Rev. W. D. Broughton, a magistrate, and other persons, went to the house of William Smith, in the month of January, 1826, and saw the other defendants; they asked to see the idiot, and were told by Sarah Smith, in the presence of Thomas Smith, that he was locked up, and that W. Smith, who was absent, had the key. However, Mr. Broughton, and those who accompanied him, went up stairs, and on opening a door, which was not locked, they found George Smith on a bed of chaff, covered with a blanket and a great coat. The window of the room was bricked up and the floor of it in a filthy state; and though the weather was extremely cold, there was no appearance that there had been any fire in the room. From this place, he was conveyed to the Stafford Lunatic Asylum, where his limbs were found to be in a contracted state, so that he could not stand or move about.

(a) 2 Camp. 650. In that case, the indictment was for wilfully omitting to provide sufficient food, &c. for E. W., the said E. W. being a servant of the defendant, and for exposing the said E. W. to the inclemency of the weather. *Lawrence, J.*, held, that the indictment, so far as regarded the omitting to provide sufficient food, &c. could not be supported, as it did not allege E. W. to be of tender years, and under the control and dominion of the defendant. And his Lordship cited a case which had been tried before *Le Blanc, J.* where a majority of the Judges had been of that opinion; but Mr. Justice *Lawrence* said, that as to the exposure to the weather, that was an act in the nature of an assault, for which the defendant might be liable, whatever the age of the servant might be. However, that part of the charge could not be made out in evidence.

1826.

REX
v.
SMITH.

Campbell, for the defendants.—I submit that this indictment is not supported. There is no actual assault proved. It should be observed, that the indictment in the case of *Rex v. Ridley*, did not charge any thing like an assault; but only a malicious non-feasance, and a positive exposure to the inclemency of the weather, contrary to the defendant's duty. But here, the assault which is charged is not proved, and all the rest of the indictment, is mere matter of non-feasance. The present indictment states, that this idiot was in the care, custody, and control of the defendants. Now a child is in the care of its parent, and that raises a duty to provide for it; but the relation of brother and brother, does not raise any such duty, and, for this purpose, the parties were absolute strangers. How can George Smith be said to be under the care, custody, or control of either of the defendants? An idiot may be as helpless as a child of tender years; but George Smith was more than twenty-one years of age; and there is nothing to shew, that there was a duty raised in any other to take care of him. The indictment alleges, that they kept him in a dark unwholesome room, and neglected and refused to administer to him sufficient meat, drink, &c. for his support, and did keep him without proper air, &c. All this is non-feasance, and there is not the slightest evidence of mal-feasance, and, certainly, no evidence of any assault. There may be evidence that he was not properly taken care of. If he had been found a lunatic, and the defendants had been his committees, that would raise a duty in them to take care of him. But if a person is alleged to be an idiot, it may be the duty of his nearest relations to take care of him; but that would be, what the moralists call, a duty of imperfect obligation. To support any of the counts except the last, it must be shewn, that either by contract or by law, there was a duty in the defendants to maintain and take care of their brother. If they did not maintain their brother, could any action be brought against them? Certainly not. Now, can there be a case of

any breach of duty, where no action is maintainable. The duty can only arise by contract or by act of law. The former, there is no pretence for, and as to the latter, he was not their child, nor were they his committees.

1826.
 Rex
 v.
 SMITH.

Whateley, on the same side.—To support this indictment, it is not sufficient that there should be a moral obligation in the defendants to maintain this unfortunate person, but there must be a legal one, such as arises from the relation of parent and child, or husband and wife, or master and servant.

Taunton, for the prosecution.—This indictment states, that George Smith was an idiot, and was under the care, custody, and control of the defendants. Now that is a question of fact; and if so, must be left to the Jury. This prosecution is not founded on the case of *Rex v. Ridley*, but on the common law. In the case of *Rex v. Ridley, Lawrence, J.* held the indictment bad, for want of the allegation that the servant was of tender years. Now, here it is alleged, that the party was an idiot; and an idiot is as much in the care and protection of others, as a child of tender years. With respect to the indictment not being supportable, because it charges only acts of omission, has Mr. *Campbell* forgotten the case of Charles Squires, who was tried for murder, caused by omitting to give an apprentice food. He was found guilty, and executed for that omission. It is said, in this case, that there was no legal obligation on the defendants. I submit that there was; and unfortunate would be the situation of such wretched beings if there were not. A brother may not be bound to take care of a brother, if the father be living; but if two brothers and a sister have received as an inmate, another brother who is an idiot, and have, in point of fact, that brother under their care and control, though this was in the first instance voluntary, the law throws on them the necessity of taking proper care of him. The

1826.
REX
v.
SMITH.

facts here shew, that this idiot was in the care, custody, and control of the defendants, because he was secured in a room in their house, which he could not get out of; and it is in evidence, that two of the defendants said, they had him locked up there. This was a positive act, and more than an act of omission. It proved literally, that he was in their custody and control. If having him in that room fastened up, is not a having him in their control, it is hard to say what would be. This is like the case of a voluntary bailee. He would not be compellable to take charge of the goods at all, but if he did become a bailee, he would be liable, if they were lost through his neglect. We do not indict them for neglecting to maintain him, but we charge, that they have had him in their custody, and have not treated him properly.

Russell, on the same side.—The indictment states, that George Smith was in the care, custody, and control of the defendants. The question, therefore, is, whether that is proved. It appears that he was helpless, and secured in a room, and when persons wanted to see him, they looked for the key of his room. If a man cannot take care of himself, he must be in the care of some one. Now, in whose care was this person? In the care of those in whose house he was locked up. Mr. *Campbell* has said, that there is no legal obligation between brother and brother. Suppose a father to die and leave two sons, one thirty years old, the other two; and if, by the neglect of the elder, the younger died while residing in his house, would he not be answerable for murder? Indeed, if it were not so, any one on whom the care of a lunatic or infant brother devolved, might get his money improperly, and then starve him to death with impunity. The seventh, eighth, and ninth counts, at all events, are proved. They are for assaults; and to constitute an assault, it is not necessary that there should be a striking. That was held in the cases of *Rex v. Nichol*, and *Rex v. Rosinski*, which were cases of inde-

cent conduct of the prisoners towards females (a); and the case of *Rex v. Ridley* was more like the present, as a part of the charge there was, for depriving the party of proper warmth.

1826.
 REX
 v.
 SMITH.

Campbell.—*Ridley's* case was not for depriving the party of warmth, but was for a mal-feasance in exposing her to cold.

Taunton.—From the whole context it appears, that the exposure in that case was not by an act done, but only by omission.

Russell.—I shall further contend, that if a person is fastened up in a room, that is, in law, an assault.

Campbell, in reply.—The question is, whether there was a legal obligation on the defendants; for mere non-feasance is only indictable when there is a liability and a neglect of a duty. In mal-feasance, a positive act is done. Mr. Justice *Lawrence* made the distinction in the broadest way, in the case of *Rex v. Ridley*. In that case, there was non-feasance and mal-feasance, and the learned Judge expressly distinguishes between the two. The defendants are said to have had George Smith in their care, custody, and control; now there is no evidence that they were his committees, or that they were under any legal liability to maintain him. And further, how does it at all

(a) In the case of *Rex v. Nichol*, Russ. & Ry. C. C. R. 130, the prisoner was indicted for an assault: he was a schoolmaster, and took indecent liberties with a female scholar, of the age of thirteen, without her consent, though she did not resist; and the twelve Judges held, that this was sufficient to support a count for a common assault.

The case of *Rex v. Rosinski*, Ry. & M. C. C. R. 19, was that of a person who pretended to be able to cure all disorders; and being consulted by a female, he took off all her clothes, (she being unwilling that he should do so), under pretence of curing her of fits; and the twelve Judges held, that this was an assault.

1826.
 REX
 v.
 SMITH.

appear, that they had any right to prevent his going away? If the people at the Lunatic Asylum had persuaded George Smith to leave the house, the defendants could have brought no action against them for getting him away. So far from that, could not the defendants have carried him to the workhouse? Nay, if they had been hard hearted enough, they might have insisted on his going there (a). In the present case, there is nothing like an assault proved. The cases of *Nichol* and *Rosinski* were both cases of an act done; but here there is not the slightest evidence of any act done by the defendants; and mere non-feasance can only become a crime when there is a breach of a legal duty.

BURROUGH, J.—I am clearly of opinion, that, on the facts proved, there is no assault and no imprisonment in the eye of the law, and all the rest of the charge is non-feasance. In the case of *Squires* and his wife for starving the apprentice, the husband was convicted, because it was his duty to maintain the apprentice, and the wife was acquitted, because there was no such obligation on her. I expected to have found in the will of the father, that the defendants were bound, if they took the father's property, to maintain this brother; but, under the will, they are only bound to pay him 50*l.* a-year, and not bound to maintain him. William Smith appears to have been the owner of the house, and Thomas and Sarah were mere inmates of it, as their idiot brother might be: as to these latter, there could clearly be no legal obligation on them; and how

(a) It is worthy of remark, that the stat. 43 Eliz. c. 2, which enacts, that the father, grandfather, mother, grandmother, and children of a poor person being of sufficient ability, shall maintain such poor person, under penalty of 20*s.* for every month they shall fail to do

so, does not extend to one brother maintaining another. So that, if a man were in a workhouse, his brother would not be compellable to contribute any thing towards his support, however able to do so.

can I tell the Jury that either of the defendants had such a care of this unfortunate man as to make them criminally liable for omitting to attend to him. There is strong proof that there was some negligence; but my point is, that omission, without a duty, will not create an indictable offence. There is a deficiency of proof of the allegation of care, custody, and control, which must be taken to be legal care, custody, and control. Whether an indictment might be so framed as to suit this case, I do not know; but on this indictment, I am clearly of opinion, that the defendants must be acquitted.

1826.
 Rex
 v.
 Smith.

Verdict—Not Guilty.

Taunton and *Russell*, for the prosecution.

Campbell, *Whateley*, and *Talfourd*, for the defendants.

[Attornies—*Keen*, and *Flint*.]

NORFOLK SUMMER CIRCUIT. 1826.

BEFORE LORD CHIEF JUSTICE BEST AND MR. JUSTICE BAYLEY.

BUCKS ASSIZES.

BEFORE MR. JUSTICE BAYLEY.

REX v. HAZY and COLLINS.

Two persons were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber-tree, without the consent of the owner. The owner died before the trial, having first given orders for the apprehension of the prisoners on suspicion. The offence was committed at 11 o'clock at night, and the prisoners, when detected, ran away. The land-steward of the owner proved, that he had not given any consent, and did not believe that his master had:—Held, that this was evidence from which the Jury might infer, that no consent had been given by the owner.

INDICTMENT on the stat. 6 Geo. 3, c. 36 (a), for lopping and topping an ash timber tree, “without the consent of the owner.” The owner (Sir J. Aubrey) had died before the trial. The offence was committed at 11 o'clock at night on the 18th February. Sir J. Aubrey died on the 1st of March following, having given orders for apprehending the prisoners on suspicion.

The land-steward was called to prove, that he himself never gave any consent; and, from all he had heard his master say, he believed that he never did.

BAYLEY, J., told the Jury, that they must be perfectly satisfied that the prisoners had not obtained the consent of the owner of the tree, (namely, Sir J. Aubrey), that they

(a) The statute enacts, “that every person who shall, in the night time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away any oak, beech, ash, elm, fir, chesnut, or asp timber-

tree, or other tree standing for timber, or likely to become timber, *without the consent of the owner or owners thereof first had and obtained,*” shall be deemed guilty of felony, and punished with transportation for seven years.

might lop and top it; and left it to them to say, whether they thought there was reasonable evidence to shew that in fact he had not given any such permission. His Lordship adverted to the time of night when the offence was committed, and to the circumstance of the prisoners' running away when detected, as evidence to shew, that the consent required had not in fact been given.

1826.
 REX
 v.
 HAZY.

Verdict—Guilty.

Dover, for the prosecution.

REX v. —————

LARCENY.—Goods, which had been lost sixteen months before, were found in the house of the prisoner. This was the whole of the evidence against him.

BAYLEY, J.—The rule of law is, that if stolen property be found, *recently* after its loss, in the possession of a person, he must give an account of the manner in which he became possessed of it, otherwise, the presumption attaches, that he is the thief; but I think, that after so long a period as sixteen months had elapsed, it would not be reasonable to call upon a prisoner to account for the manner in which property supposed to be stolen came to his possession.

If the only evidence against a prisoner indicted for larceny be, that the goods were found in his possession sixteen months after they had been stolen, the Judge will direct an acquittal, without calling on him for his defence.

Verdict—Not Guilty.

1826.

CAMBRIDGE ASSIZES.

BEFORE LORD CHIEF JUSTICE BEST.

July 11th.

PERCIVAL, Clerk, *v.* COOKE and Others, Executors of
MAULE, Clerk.

Dilapidations. The executors of a deceased incumbent are not bound to put the rectory house into a *finished* state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, in the estimate of dilapidations due from them.

CASE for dilapidations. Plea—General issue.

This action was brought by the plaintiff, as Rector of Horsheath, in the county of Cambridge, against the defendants as the executors of the late incumbent, who died on the 25th of January, 1825. The plaintiff claimed 784*l.* for the dilapidations of the rectory-house. A witness, called for the plaintiff, stated, that considerable repairs had been made since the incumbency of the plaintiff; but, on his cross-examination, it appeared, that those repairs had been so made with timber to the value of 60*l.* or 70*l.* which had been cut down by the plaintiff, but which had been growing on the glebe in the time of the late incumbent.

Dover and *Kelly* contended, that the defendants were entitled to be allowed for this, because, if the late incumbent had effected these repairs in his lifetime, he would have been entitled to have cut down this timber, and have used it in the repairs.

BEST, C.J.—I am of opinion, that the defendants are entitled to an allowance for this timber, in the estimate of the repairs.

A surveyor proved, that he had examined the premises, and that the dilapidations amounted to the sum of 784*l.* On his cross-examination, he said, that nothing had been pulled down on the premises that he knew of, and that he had made his valuation on the principle, that the premises

ought to be put into thorough repair, fit for the occupation of a gentleman. He further stated, that he had included in that sum the expense of painting the rectory-house twice in oil on the inside, and three times on the outside; and also the expense of taking off and renewing the old tiling, and old lead of the roof; and further, as the windows were all in bad condition, and old fashioned, he had included the expense of putting in new windows in the modern stile.

1826.
PERCIVAL
v.
COOKE.

BEST, C. J.—Did you make your estimate on the principle, that the present incumbent was to walk into premises in a complete and finished state of repair?

The witness.—I did, my Lord.

BEST, C. J.—This is entirely wrong. The surveyor has gone on the principle that the representatives of the late incumbent are bound to do every thing to the premises which an in-coming tenant would do. That is not law. They are bound to do no more than ought to be performed by an out-going tenant. On this principle the valuation ought to have been made. The present estimate is worth nothing.

In answer to a question by his Lordship, what would be the difference between valuations made on those two principles, the witness stated about 300%.

BEST, C. J. (to the plaintiff's counsel.)—You had better make some arrangement, otherwise it will be my duty to tell the Jury that the defendants are not bound to pay that part of the estimate which relates to the putting of the premises into a *finished* state of repair. The executors of a deceased incumbent are, in fact, bound to do nothing more than to restore what is actually in decay, and to

1826.
 PERCIVAL
 v.
 COOKE.

make such repairs as are absolutely necessary for the preservation of the premises.

Verdict for 400*l.* by consent, being 384*l.* less than the sum claimed.

Storks and Pryme, for the plaintiff.

Dover and Kelly, for the defendants.

[Attornies— ———, and *Egan & W.*]

For the report of this case, we are indebted to the kindness of one of the Counsel engaged in it.

SUFFOLK ASSIZES.

BEFORE MR. JUSTICE BAYLEY.

DOE, on the demise of TINDALE, v. HEMMING and Another.

In ejectment by an heir at law, against a defendant who claims under a lease granted by an ancestor of the lessor of the plaintiff; if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him on notice, it may be given in evidence, without proof of its execution by the subscribing witness.

EJECTMENT by an heir at law, against the defendants, who were stated to be the tenants of a person who claimed as devisee under a will; and this ejectment was brought for the purpose of trying the validity of that will.

The lessor of the plaintiff having proved a *prima facie* title, as heir at law, the counsel for the defendants stated, that a lease had been granted by the devisor (who was an ancestor of the lessor of the plaintiff, and through whom he derived his title,) to the defendants, which was still unexpired; and as that lease took the right of possession out of the lessor of the plaintiff, it would preclude him from recovering in this action, whether the will were valid or invalid. It was, however, suggested, that the lease had found its way into the hands of the lessor of the plaintiff, who being called upon to produce it, (notice having been duly given), did accordingly produce it. The instrument appeared to have been executed in the presence of a subscribing witness, who was not in attendance.

The counsel for the defendants proposed to read the lease, without proving it by the subscribing witness.

Storks and *Robinson*, for the lessor of the plaintiff, objected to the reading of the instrument without such proof.

Dover and *Kelly*, for the defendants, contended, that the lease coming out of the hands of the heir at law, who claimed an interest in the land, must be taken to be good as against him, so as to dispense with proof of its execution.

BAYLEY, J.—I am of opinion, that an heir at law producing a lease granted by an ancestor, under whom he claims, although it is to be used as evidence against his right to present possession of the land, is estopped from disputing the due execution of the instrument. It is therefore unnecessary for the defendant to call the subscribing witness.

Nonsuit.

Storks and *Robinson*, for the lessor of the plaintiff.

Dover and *Kelly*, for the defendants.

In the ensuing Term, *Storks* moved to set aside the nonsuit; but the Court of King's Bench refused the rule.

1826.
 Doe
 d.
 TINDALE
 v.
 HEMMING.

CASES ON THE
NORFOLK ASSIZES.

BEFORE LORD CHIEF JUSTICE BEST.

—◆—
SLY v. STEVENSON.

A warrant under the stat. 6 Geo. 4, c. 16, s. 29, to search for the goods of a bankrupt in the house of a third person, is not valid, if granted to any one except the messenger under the commission.

A constable, who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has thereby a right of action (supposing the warrant illegal) against the magistrate under whom he acts.

TRESPASS for breaking and entering the plaintiff's house, and seizing his goods. Plea—General issue.

The defendant was a constable, and having been directed by the assignee under a commission of bankrupt against the father of the plaintiff, to procure a warrant to search the plaintiff's house for property of the bankrupt, supposed to be fraudulently concealed there, went to the office of a magistrate at Norwich, and obtained in his absence from one of his clerks an old warrant issued for a similar purpose, about a month previously, directed to another constable, and by him executed and returned. The defendant having struck out the name of the former constable, and inserted his own in the warrant, without any authority from the magistrate, proceeded to the house of the plaintiff, and committed the trespass in question.

Robinson, for the defendant, having proved a strong case of fraud between the plaintiff and his father, the bankrupt, and shewn, that most of the goods seized had been secretly conveyed from the bankrupt's house, and mixed up with the stock of the plaintiff, contended, that the defendant on the whole of the facts was entitled to a verdict, he having, before action brought, given the plaintiff a copy of the warrant, pursuant to the 24 Geo. 2, c. 44.

Kelly and Gunning, for the plaintiff, submitted, that the clause of the new bankrupt act (6 Geo. 4, c. 15, s. 29)(a),

(a) That section is as follows:
"That in all cases where it shall be made to appear to the satisfaction of any justice of peace in England or Ireland, that there is reason to suspect and believe that

property of the bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such justice of peace is hereby directed and authorised to grant a search warrant to the per-

under which the warrant had originally been obtained, authorised a magistrate to grant such a warrant to no other person than the messenger under the commission, and consequently, that the defendant could not protect himself under the bankrupt act, even supposing the warrant to have been regularly issued. But they also urged, that this warrant had been obtained under circumstances, which, assuming it to be illegal, gave no right of action against the magistrate; and consequently, that the defendant was liable, although a constable, and acting under a warrant *de facto*.

1826.
 SLY
 v.
 STEVENSON.

BEST, C. J.—I am of opinion, that on both grounds the plaintiff is entitled to recover.

Verdict for the plaintiff, with nominal damages.

His Lordship refused to certify, to deprive the plaintiff of his costs, in consequence of the misconduct of the defendant in obtaining the warrant.

Kelly and Gunning, for the plaintiff.

Robinson and Evans, for the defendant.

son so deputed by the commissioners as aforesaid. And it shall be lawful for such person to execute the same in like manner; and such person shall be entitled to the same protection as is allowed, by law, in execution of a search

warrant for property reputed to be stolen and concealed." From s. 27, it appears, that the person alluded to as the person "deputed by the commissioners," is the messenger.

BACK v. STACEY.
 [Special Jury.]

THIS was an issue directed by the Lord Chancellor to try, *First*, whether the ancient lights of the plaintiff in his dwelling-house in the city of Norwich had been *ille-*

cient lights, it is not sufficient, that the plaintiff has less light than he had before; but there must be such a privation of light as will render the occupation of his house uncomfortable, and prevent him, if in trade, from carrying on his business as beneficially as he had previously done.

To constitute an illegal obstruction, by building, of the plaintiff's an-

1826.
 BACK
 v.
 STACKY.

gally obstructed by a certain building of the defendant. And, *Secondly*, If the first issue should be found in the affirmative, what damage the plaintiff had sustained in respect of the injury.

A great many witnesses, including several surveyors of eminence, were examined on both sides; and it was evident, that the quantity of light previously enjoyed by the plaintiff, had been *diminished* by the building in question. Under these circumstances, it was contended for the plaintiff, that he was at all events entitled to a verdict on the first issue, *any obstruction* of ancient lights being wrongful and illegal.

BEST, C. J., told the Jury, who had viewed the premises, that they were to judge rather from their own ocular observation, than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient, to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house *uncomfortable*, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises, as *beneficially* as he had formerly done. His Lordship added, that it might be difficult to draw the line, but the Jury must distinguish between a *partial inconvenience* and a *real injury* to the plaintiff in the enjoyment of the premises.

The Jury found for the defendant on both issues.

Storks, Robinson, and Rolfe, for the plaintiff.

Kelly and Gunning, for the defendant.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

*Second Sitzings at Westminster, in Michaelmas
Term, 1826.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

WILSON v. GALLATLY.

1826.

Nov. 20th.

ASSUMPSIT for work and labour. Plea—General issue. For the plaintiff it appeared that he had done work as a glazier at the house of the defendant; and that the defendant had promised to pay him.

The defence was, that a person named Flewer had been employed to do this work, and that the plaintiff was employed by him and not by the defendant; and that Flewer having become bankrupt, his assignees had been paid by the defendant for the work in question.

To prove this Flewer was called. He stated that he had not obtained his certificate.

Brougham for the plaintiff.—He is, I submit, not a competent witness, because if the plaintiff recovers in this action, the witness having no certificate, will be liable to repay the defendant, on the ground that the amount has been already paid to his assignees by mistake.

If in assumpsit for work and labour, the defence be that A. B. was employed to do the work and not the plaintiff. A. B. is a competent witness to prove this, although he is an uncertificated bankrupt, and his assignees have received the amount due for this very work as work done by him.

1826.
 WILSON
 v.
 GALLATLY.

ABBOTT, C. J.—I don't see how that money could be recovered back; and further, I think that the judgment in this action would not be evidence in an action against his assignees, to recover back the money, because it is between other parties.

The witness was examined.

Verdict for the plaintiff.

Brougham and Thesiger, for the plaintiff.

Denman and Archbold, for the defendant.

[Attornies.—*Hooper and Branscomb*.]

Nov. 20th.

HEWET and Another v. GOODRICK.

If after a bill of exchange has been dishonoured and notice of dishonour duly given, the holder take part of the amount of the acceptor, and offer to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not accepted—This is not such a giving of time to the acceptor as will discharge the drawer. But if the holder had disabled himself from suing on the bill, it is otherwise.

ASSUMPSIT by the plaintiffs as payees of a bill of exchange for 110*l.* drawn by the defendant and accepted by a person named Poole. Plea—General issue.

The defence was, that after the bill had been dishonoured, and notice of the dishonour given to the defendant; the plaintiffs had agreed to give time to the acceptor, and to take the amount by instalments, and that therefore the defendant as drawer was discharged.

To substantiate this it was proved, that before the dishonour of the bill, the acceptor said he could not take it up; and that Mr. Ford, one of the plaintiffs, said he must pay as much as he could; and that several days after the dishonour of the bill, the acceptor, at the desire of Mr. Ford, paid 30*l.* which was written off the bill; and Mr. Ford, two or three days after, told the defendant that if a warrant of attorney was given, they would take it by instalments; however, no warrant of attorney was given.

ABBOTT, C. J.—This is not giving time to the acceptor: giving time is where the party disables himself from suing

on the bill; but giving the acceptor indulgence after notice of dishonour; and the holder getting all he can from the acceptor, is highly beneficial to the drawer. If the holder disables himself from suing on the bill, that discharges the drawer; but taking part of the amount from the acceptor, after the drawer has had notice of dishonour, does not.

1826.
Hewer
v.
Goodnick.

Verdict for the plaintiffs.

F. Pollock, for the plaintiffs.

Scarlett, for the defendant.

[Attornies.—*Gray and Wrentmore & G.*]

Second Sitzings in London, in Mich. Term.

FOSTER and Others, Asssignees of FOWLER, a Bankrupt,
v. FRAMPTON.

Nov. 22d.

TROVER for three hogsheads and twenty lumps of sugar. Plea—General issue.

It appeared that the bankrupt was a grocer at Birmingham, and that the defendant, who carried on business in London, sold the goods in question to the bankrupt, on the 30th of August, 1825, and that they were sent to Birmingham by a carrier named Corbet, accompanied by the following invoice :

London, 30th August, 1825.

Mr. Michael Fowler,

3 H.Hds. raw sugar	-	-	£148	3	4
20 Lumps	-	-	-	31	19 10
			£180	3	2

If goods be sold by A. to B. and sent by C. a carrier, and on their arrival at the town in which B. resides, he takes samples of them, and having no warehouse of his own, lets them remain in the warehouse of C. They cannot, after that, be stopped in transitu.

It was proved that on the 5th of September the goods arrived at Corbet's wharf, in Birmingham, and that the

1826.
FOSTER
v.
FRAMPTON.

bankrupt not having warehouses capable of containing hogsheads, his practice was to keep the more bulky part of his stock at Corbet's wharf. On the 6th of September the bankrupt took a sample from each of the hogsheads, and carried the lumps to his shop. The bankrupt committed an act of bankruptcy on the 4th of October, 1826, on which a commission of bankrupt was sued out. The hogsheads of sugar remained at Corbet's wharf till the 12th of October, when Corbet received notice from the defendant, as the vendor of the goods, to stop them, and not deliver them to the bankrupt; and the goods were afterwards delivered up to the defendant under an indemnity. It was further proved that the bankrupt had a quarterly account of carriage with Corbet, on which the credit was not expired at the time of the bankruptcy, and that he might have taken the sugars away at any time he had chosen to send for them.

Gurney, for the defendant, contended, that as the goods had not been delivered, and were in the hands of the carrier, the *transitus* was still subsisting, and the vendor might stop them.

ABBOTT, C. J. — The warehouse of the carrier was, I think, the warehouse of the bankrupt, exclusive of the circumstance of the samples being taken, which is a fact much relied on in one of the cases. I am therefore of opinion that the *transitus* was at an end.

Verdict for the plaintiffs, damages 148*l*.

Scarlett and ———, for the plaintiffs.

Gurney, for the defendant.

[Attornies.—*Adlington & Co.*, and *Few & Co.*]

1826.

Sittings at Westm. after Mich. Term, 1826.

BEFORE LORD CHIEF JUSTICE ABBOTT.

COBBETT, Executor of BOXALL, v. CLUTTON and Another, Gents. two, &c.

Dec. 5th.

TROVER for a box and deeds. Plea—General issue.

It appeared that the testatrix, Mrs. Boxall, died in the month of August, 1825, and that a box containing deeds and other papers belonging to the testatrix, was at the house of Mr. William Clutton, of Hartwood, a relation of the defendant Clutton. The box, with its contents, was sent by him to the office of the defendants to be delivered to the plaintiff as her executor, on the plaintiff's giving a schedule of the deeds contained in the box. It was proved that the plaintiff demanded the box and its contents of the defendants; but they refused to deliver it up, unless the plaintiff would give them a schedule of its contents.

Marryat, for the defendants.—The defendants received this box from Mr. William Clutton, as his agents; and they had it delivered to them, on the special trust to deliver it to the plaintiff on his giving an inventory. Now, if they had delivered the box over against their authority, they would have been doing wrong. A demand and refusal are evidence of a conversion, but if it appears that the refusal was on a fair ground, that is no conversion. William Clutton was interested in the property, and without an inventory he could have no check on the executor, who might do what he chose with the papers in the box. And further, it is the daily practice when papers are delivered up, for the party delivering them to take a receipt specifying what papers are delivered up.

If A. has in his possession a box containing papers belonging to a person deceased, and send the box with its contents to his solicitors, with directions to deliver the box and papers to the executor, on his giving an inventory of them, and a receipt: Held that trover lies against the solicitors, if they refuse to deliver the box and papers to the executor, he refusing to give an inventory and receipt, although the solicitors offered to give them up if the executor would give an inventory and receipt.

1826.
 COBBETT
 v.
 CLUTTON.

ABBOTT, C. J.—It is in evidence that Mr. William Clutton desired it; but I am of opinion that the defendants had no right to insist upon an inventory before they delivered up the box. The plaintiff, as executor, was entitled to the possession of the papers of the deceased, and that being so, he is entitled to recover in this action.

Verdict for the plaintiff.

Chitty and Pattison, for the plaintiff.

Marryat and Comyn, for the defendants.

[Attornies.—*Faithfull*, and *Clutton & Carter*.]

Dec. 6th.

BILLARD and Another v. HAYDEN and Another.

If the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A., who indorses a bill of exchange to him in payment—The plaintiff cannot recover on that bill against the acceptor, although there was no evidence that the plaintiff was the importer of the prohibited goods.

ASSUMPSIT by the plaintiffs as indorsees, against the defendants as acceptors of a bill of exchange, drawn by a person named Fiestall, for 73*l.* 10*s.* payable to the drawer's order, and by him indorsed to the plaintiffs.

The defence was, that the bill had been indorsed to the plaintiffs for the price of a quantity of French silks, sold by them to Fiestall the drawer of the bill. This sale being antecedent to the stat. 6 Geo. 4, c. 111, which allows the importation of French silks, it was contended that it was void under the stat. 50 Geo. 3, c. 55, s. 1 (a).

(a) By the stat. 50 Geo. 3, c. 55, s. 1, it is enacted, "that no foreign silk, crapes, or tiffanies of any description whatever, (except of China or the East Indies, imported for exportation), shall, from and after the passing of this act, be imported, brought, or conveyed into the kingdom of Great Britain, or the islands of Guernsey, Jersey, Alderney, Sark or Man; and if any such foreign silk, crapes, or tiffanies, shall be found

in the custody or possession of any person or persons in Great Britain, or the islands aforesaid, and which shall not have been imported, brought, or conveyed into the same respectively, and on which the proper duty of customs shall not have been paid before the passing of this act, the same shall be forfeited; and in case any such foreign silk, crapes, or tiffanies, shall, at the time of the importation, be mixed with,

To prove this, the drawer stated that the plaintiffs were silk merchants, having a silk manufactory in Paris, and that he indorsed this bill to them in payment for a quantity of manufactured silk goods, which one of the plaintiffs stated to be French, though the witness could not positively swear that they were so.

1826.
BILLARD
v.
HAYDEN.

Comyn for the plaintiffs.—The stat. 50 Geo. 3, c. 55, only prohibits the importation of foreign silks, and it does not at all appear that the silks were imported by the plaintiffs. The statute does not make the sale of them void; and I would submit, that as there is no evidence that the plaintiffs imported them, they are still entitled to recover on the bill.

ABBOTT, C. J.—This transaction arose before the late

sewed, or made up in any apparel, garment, or furniture, or other materials, all such foreign silk, crapes, and tiffanies, and also the apparel, garment, or furniture, and other materials, in, with, or upon which the same shall be mixed, sewed, or made up, shall be forfeited, and the importer and importers, and the person and persons in whose custody or possession the said crapes, or tiffanies, or apparel, garment, or furniture, or other materials, shall be found; or who shall vend, utter, sell, or expose to sale, or otherwise dispose of any such crapes, or tiffanies, or apparel, garment, furniture, or other materials, or who shall sew, work, or make up any such crapes or tiffanies in Great Britain, or the islands aforesaid, for, or in, or upon any garment, or wearing apparel, shall be subject and liable to the like penal-

ties, to which the importers and person having in their custody or possession, or vending, uttering, selling, or exposing to sale, or otherwise disposing, or sewing, working, or making up any foreign wrought silks or velvets, are subject and liable by an act passed in the sixth year of the reign of his present Majesty, for prohibiting the importation of foreign wrought silks and velvets." But the prohibition contained in that section is repealed by the stat. 6 Geo. 4, c. 165, s. 277, and by the stat. 6 Geo. 4, c. 111, a duty is laid on the importation of foreign silks, which was altered in some respects by the stat. 7 Geo. 4, c. 63.

Although this case is thus rendered less important as to foreign silks, it appears equally to apply to any other species of goods, the importation of which is prohibited.

1826.
 BILLARD
 v.
 HAYDEN.

act. The stat. of the 50 Geo. 3, c. 55, prohibits the importation of all foreign silks, and I have no hesitation in saying that if these were foreign silks, and the bill was given in payment for them, the plaintiffs cannot recover.

Verdict for the defendants.

Comyn, for the plaintiffs.

Chitty, for the defendants.

[Attornies.—*Griffen*, and *R. A. Cottle*.]

Dec. 7th.

MAYELSTON v. Lord Viscount PALMERSTON.

Variance. If in an action of covenant the declaration state that the deed was made between the plaintiff of the first part; J. C. of the second part; and A. B. of the third; and the deed, when produced, appear on the face of it to be by the plaintiff as trustee of J. C. of the first part; G. C. of the second; and A. B. of the third part; and the deed be executed by G. C. This is a fatal variance, although the breaches assigned do not in any way affect the party who is intended to be described as of the second part.

COVENANT. The declaration stated, that on the 26th day of November, 1803, "by a certain indenture then and there *made* between the said plaintiff, (therein described), of the first part; *James Cook* and *Hannah* his wife, of the second part; and *John Champain*, (therein described), of the the third part; one part of which said indenture, sealed with the seal of the said *John Champain*, the said plaintiff now brings here into Court, the date whereof, &c. he the said plaintiff did demise and lease unto the said *John Champain*, &c. three several coach houses, &c. for twenty-one years. It then stated covenants by *Champain* and his assigns to keep the premises in repair, and to give up the premises and fixtures at the end of the term; that *Champain* assigned the term to the defendant; and breaches were assigned, that the defendant did not keep the premises in repair, &c. Plea, *non est factum*; and special pleas traversing all the breaches. The execution of the lease was proved.

Marryat, for the defendant, (having looked at the deed), submitted that the plaintiff must be called. The lease is described in the declaration as an indenture of the plaintiff, of the first part; *James Cook* and *Hannah* his wife, of the

second part; and John Champain, of the third part. Now, in point of fact, the deed itself states the plaintiff as the trustee of *James* Cook, and Hannah his wife, to be of the first part; and that *George* Cook and Hannah his wife are of the second part; and John Champain, of the third part; and the deed is executed by *George* Cook; so that he is called George in one part of the deed, *James* in another, and he executes as George. Now, I submit that in the declaration it should have been stated to be made by *George* Cook, because he executes it by that name; and if in the body of the deed he was called James, it should be stated to be made by George Cook, but purporting to be the deed of James.

1826.
MAYELSTON
v.
PALMERSTON.

Praed, on the same side.—The allegation, that the deed was made by certain parties, must be taken to mean, that it was executed by them; and in the case of *Hall v. Caze-hove*, 4 Ea. 477, the correct form of declaring will be found (a). There the deed was sealed on a day different

(a) In the case of *Hall v. Caze-hove*, the declaration stated that, “whereas by a charter party of affreightment, purporting to be indented, made and concluded, in London, on the 6th of February, 1801, between the plaintiff as owner of the ship *Argo*, then lying in the River Thames, and bound for Demerara, on the one part; and the defendant and one J. B. of London, merchants, on the other part; but which charter party was in fact, first indented, made, and concluded after the 6th day of February, to wit, on the 15th of March, 1801, and not on the 6th of February, or at any time before, and was also in fact sealed and delivered by the plaintiff and defendant only, and not by the said J. B. one part of which charter

party sealed, &c. the plaintiff now brings here into Court, the date whereof is the said 6th day of February, 1801, it was witnessed that the owner,” &c. The defendant cravedoyer of the charter party, and demurred, and shewed for cause that it did not appear that the charter party was first indented, made, and concluded, after the 6th of February, 1801, but that it appeared by the charter party, that the same was indented, made, and concluded on the said 6th of February, in the year aforesaid, and that the plaintiff was by law estopped from making the allegations. But the Court overruled the demurrer, and gave judgment for the plaintiff.

1826.
 MAYELSTON
 v.
 PALMERSTON.

from the date, and that was averred; and here the declaration should have first stated it as a deed purporting to have been made between such and such parties, and then have averred that it was made by persons of different names.

Gurney, for the plaintiff.—We have in our declaration followed the description of the parties at the beginning of the instrument, and we prove our allegation, by shewing the parties to be so described in the deed.

Talfourd, on the same side.—The covenant we declare on is by Champain, and the part of the deed that regards him is all that is material to us in this cause (*b*).

ABBOTT, C. J.—The question is, whether the plaintiff, in his declaration, has rightly described the deed: the declaration alleges it to be by the plaintiff, of the first part; *James Cook* and *Hannah* his wife, of the second; and *Champain*, of the third. By one part of the deed that ap-

(*b*) In the case of *Gordon v. Austin and Others*, 4 T. R. 611. The plaintiff sued on a promissory note, made by the firm of *Austin, Strobell, and Shirtliff*, who were declared against by the names of *William Austin, Robert Strobell, and William Shirtliff*, the two last of whom were stated to be outlawed,—the defendant *Austin* pleaded the general issue. At the trial, it appeared that the note was signed by the name of the firm, as first mentioned; and it was proved that the partnership consisted of *William Austin, Daniel Strobell, and William Shirtliff*. It was objected that the plaintiff ought to be nonsuited, on the ground of variance between the contract declared upon, and that proved; it appearing to be be-

tween different persons. *Erskine*, *contra*, contended, that as the defendant was properly described, he could not take advantage of a variance with respect to the names of the others, and he having alone pleaded the general issue, the question at nisi prius would only be whether he had promised or not. But the Court held, that the action, being on a written instrument, the evidence did not prove the contract declared on. And Mr. Justice *Buller* said—It stands thus, the plaintiff declared upon a note given by three persons, describing them, and the note given in evidence was made by different persons. The evidence, therefore, did not support the contract declared upon.

pears to be correct, but by another part of the deed, it is made uncertain whether it is the deed of *James Cook*, or of *George*; and when we come to the execution, we find that that is by *George Cook*. Now, the plaintiff states it to have been *made* by *James Cook*, and I am of opinion that it was made by *George Cook*; and I think the plaintiff must be called.

1826.
MAYELSTON
P.
PALMERSTON.

Nonavit.

Gurney and Talfourd, for the plaintiff.

Marryat and Praed, for the defendant.

[Attornies.—*Ross & Co.*, and *C. Wilson*.]

GREAVES v. HUNTER.

Dec. 8th.

MONEY had and received. Plea—General issue.

To prove a letter to be of the defendant's handwriting, *Mr. Holdsworth*, the plaintiff's attorney, was called; he said, I know the defendant's handwriting from having seen other papers in the Master's office, which were admitted to be of his handwriting by the defendant's attorney, and I have frequently acted on those papers so admitted to be of his handwriting; but I never saw the defendant write, nor did I ever correspond with him.

If a person prove that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the master's office, which the attorney of the party admitted to be of his handwriting, and the person has acted on these papers so admitted: This is not such a knowledge of the party's handwriting as will enable the person to prove a written document alleged to be in his handwriting.

ABBOTT, C. J.—This is not sufficient. The witness cannot be allowed to compare the paper he is called to prove with those he speaks of at the Master's office, which is all that this amounts to.

The plaintiff made out his case by other evidence.

Verdict for the plaintiff.

Brougham and Talfourd, for the plaintiff.

Scarlett, for the defendant.

[Attornies.—*Hutchinson & H.*, and *Rosser*.]

1826.

Dec. 11th.

On the question whether a place is parcel of a certain parish, old entries made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs, &c. done to a chapel in the parish church, alleged to belong to the place in question, are not evidence.

COOKE, Esq. *v.* BANKS and Another.

TRESPASS for taking the plaintiff's goods. **Plea—**General issue. The defendants were parish officers of St. Andrew, Holborn; and the real question to be tried in this case was, whether the Stone Buildings in Lincoln's Inn, were a part of the parish of St. Andrew, Holborn.

The taking of the goods was admitted; and among a great deal of other evidence to shew that this part of Lincoln's Inn was a part of this parish, and that the inhabitants of Lincoln's Inn had a chapel in St. Andrew's Church—the defendants' counsel, having proved that a person named Bentley was churchwarden of the parish in the year 1584, wished to read several entries in a book, produced from among the parish books, written in a handwriting of Queen Elizabeth's reign, the title of which was "The Sacristary Register or Vestry book, containing the days, and years, and names of such temporal officers belonging to the church and parish, as yearly are to be chosen, by order, within the parish of St. Andrew, in Holborn, at the vestry; as also all such rates, ordinances, decrees, statutes, arbitraments, and agreements, as have been had, made, and done, by the parson, churchwardens, and assistants, from time to time, since the year of our Lord 1581, at their several sittings, to the glory of God, the peace of the church, and wealth of the parish, now first collected and reduced into a register or book for good order sake, and a precedent to be followed and well continued and kept of his successors, by Thomas Bentley, churchwarden, A. D. 1584."

Near the end of the book was this title, "Some monuments of antiquities worthy memory, collected and gathered out of sundry old accounts, had and made by churchwardens, night wardens, and such like officers of the parish, since the time of king Henry the sixth, by Thomas Bentley, Gent. sometime an unprofitable member and churchwarden of the parish, in the year of our Lord, 1584."

Under this title was the following entry, which the defendants' counsel proposed to read:—

1826.
COOKE
v.
BANKS.

The pews in
Lincoln's Inn
Chapel. “ *Item*, the first three pews in 22 Eliz.
“ Lincoln's Inn Chapel, were made
“ by Balian, carpenter, at the assignment of
“ Mr. Heryn, then churchwarden, and cost the parish 5*l*.
“ which eight pews cost in all 10*l*. 16*s*. and better, as ap-
“ pears in Mr. Roper's accounts.

ABBOTT, C. J.—(Having read the entry). This is matter of history, and therefore is not evidence.

Scarlett, for the defendants.—I submit it to your Lordship as matter of reputation, and therefore evidence.

ABBOTT, C. J.—General reputation may perhaps be evidence, but not a statement of particular facts.

Scarlett.—I wish to shew a reputation that Lincoln's Inn had a chapel in St. Andrew's, Holborn.

ABBOTT, C. J.—I think that this entry is not admissible as evidence of that fact.

Scarlett then proposed to read the entry which was in the same book next but one to the preceding. It was as follows:

All the glass
windows in the
church pitiously
broken with the
clap of gunpow-
der burnt in
Shoe Lane. Mr. “ *Mem^{dum}*. That this year al- 25 Eliz.
Steward's arms “ so, in the month of *July*, 1583,
set up in Lin- “ all the glass windows in the church, espec-
coln's Inn cha- “ ally the windows in *Lincoln's Inn* chapel, a
pel window, A.D. “ little before new glazed with many fair coats
1580, are defac- “ or scutcheons of arms, emblazoned at the
ed and broken. “ only charges of Mr. ——— *Steward*, that mar-
“ ried Mrs. *Compion*, of this parish, and late
“ deceased, were pitifully shaken, rent, and
“ broken down, as all the houses round about that part of the

1826.

COOKE

v.
BANKS.

“ parish almost were, with the monstrous and huge blast
 “ of the gunpowder, that lately was set on fire and blew
 “ up all the gunpowder house, and other tenements in
 “ Fetter Lane, to the destruction of many houses and
 “ spoil of much goods thereabouts, yea, and to the death
 “ of one or two men.”

Scarlett.—We submit, that this entry is evidence, because, at this time, Bentley was churchwarden; and as this entry goes to admit that the parish were bound to repair the windows, it is an admission of a right against themselves.

ABBOTT, C. J.—Does the writer of the book charge himself by this entry.

Scarlett.—No, my Lord.

Tindal, S. G.—The title in the book under which these entries are placed, is “Some monuments of antiquities worthy of memory, collected by Thomas Bentley, churchwarden, in the year 1584,” and the running title of that part of the book is, “Memorable Antiquities.”

ABBOTT, C. J.—(Having read the entry). It is the history of blowing up a house in Fetter Lane, by gunpowder, and the effect it had on the parish church.

Scarlett.—We don't use it as evidence of the fact of the blowing up of the house, but as the reputation of the limits of the parish; and we submit that this entry would be evidence if the question were whether the churchwardens were bound to keep this window in repair.

ABBOTT, C. J.—The entry speaks of the glazing being done by a particular individual. I think it is not evidence.

The defendants' counsel then offered an entry, in the

same book next after the entry above set forth. It was as follows:—

1826.
COOKE
v.
BANKS.

The new stone door in Lincoln's Inn Chapel, made. *Mem^{dum}.* That the new door of stone and wainscot in Lincoln's Inn chapel, leading to the south church yard, was made this year by consent of the vestry, for the ease of the parishioners, gentlemen, and others, lately placed in the new pews, the chancel and aisles; which alone, all charges received, stood the parish in 4*l*. 3*s*. 11*d*. as appeareth more partlarly in the book of accounts." 26 Eliz.

The four new pews in Lincoln's Inn chapel, first made. *Mem^{dum}.* That the two pews wherein Mrs. Payne and Mrs. Bartlett now are set, together with the two wainscot pews, where Mrs. Aylworth and Mrs. Cowper are placed, were this year also new added to Mr. Peryn's pews, made in his first time, and now first made for Mrs. Aylworth, at the charges of the parish for the most part, save that Mr. Aylworth gave towards his wife's pew fifty shillings. The charges of these four pews, as appeareth by the accounts, was above 7*l*., whereoff Mr. Aylworth, as I said, paid fifty shillings for his wife's pew; so they stood the parish but in 4*l*. 16*s*. 26 Eliz.

ABBOTT, C. J.—These entries profess to speak only of particular facts; and entries of particular facts, are not receivable unless the party making them charges himself; that is the general rule.

Scarlett.—That, my Lord, is undoubtedly the general rule. But I submit, that this is in the nature of a public book; and if the question was, whether a particular part of the parish had a right to a certain pew in the church, would not an entry, stating that the parish had repaired it, be evidence against the parish.

1826.
 COOKE
 v.
 BANKS.

ABBOTT, C. J.—This entry does not go near that. If you feel confident that it ought to be received, I will receive it, but my present opinion is, that it is inadmissible.

The defendants' counsel then withdrew the book.

Verdict for the defendants(a).

Tindal, S. G., *Nolan*, and *Campbell*, for the plaintiff.

Scarlett, *Gurney*, *Merewether*, and *Coleridge*, for the defendants.

[Attornies.—*Green*, P. & C., and *J. S. Taylor*.]

Tindal, S. G. obtained a rule *nisi* for a new trial, on the ground that the verdict was against the weight of evidence.

(a) Entries in private books are in general not evidence, unless the party making them charge himself by so doing; but entries in the books of deceased rectors, vicars, &c. are evidence as to questions of tithe, because these entries can only benefit their successors. In the case of *Bullen v. Michel*, 4 Dow, 297, and 2 Price, 399, where the question was, whether certain farms were covered by moduses, the defendant, having shewn that search had been made in the registries of the diocese for the endowment of the vicarage, wished to read as secondary evidence of it, certain entries from a book called the Chartulary of Glastonbury Abbey, to which abbey the advowson had belonged. This Chartulary was produced from the muniment room of the Marquis of Bath, into whose hands some of the lands of the Abbey had passed. This book contained,

besides the entries in question, several others relative to the rights of the Abbey, an account of the giants who originally inhabited the British Island, a genealogy of the Kings of England, beginning with Adam, something *de pondere Lanae*, a calendar, a list of bulls and licenses, &c. The handwriting was proved, from its style, to be of the end of the 13th, or the beginning of the 14th century. These entries were objected to, and *Chambre*, J. held them to be inadmissible; but the Court of Exchequer (*Wood dissentiens*) granted a new trial, conceiving that they ought to have been admitted; *Bayley*, J. at the second trial admitted them; and a verdict being found for the defendant, the plaintiff afterwards appealed to the House of Lords; and it was there held that the entries were rightly admitted in evidence.

1826.

WEMYS, Esq. Executor of WEMYS, v. GREENWOOD
and Another.

Dec. 12th.

MONEY had and received. Plea—General issue.

This action was brought by the plaintiff, as executor of the late General Wemys, to recover a sum of 200*l.* alleged to have been due to him, as a balance of the off reckonings of the ninety-third regiment of foot, of which the plaintiff's testator had been colonel. There was no fact in dispute, and the case turned on a mere question of law. The Jury found a verdict for the plaintiff, subject to the opinion of the Court of King's Bench, on a special case.

Practice—

Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the L. C. J. refused to certify for the special Jury.

Brougham for the plaintiff, applied to the Lord Chief Justice to certify that this was a fit case to be tried by a special Jury.

ABBOTT, C. J.—I cannot certify for the special Jury: here is no question of fact in dispute between the parties, and I cannot say that there was any necessity for a special Jury.

Brougham and *Parke*, for the plaintiff.

Tindal, S. G., and *Curwood*, for the defendants.

[Attornies—*Vizard & B.*, and *Fynmore & Co.*]

REX v. CROSS.

Dec. 13th.

INDICTMENT for a nuisance in keeping a house for slaughtering horses, at a place called Bell Isle, in the parish of St. Mary, Islington. There were also counts

If a party set up a noxious trade, remote from habitations and public roads, and after that

new houses are built, and new roads constructed near it, the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads.

1826.

REX
v.
CROSS.

framed on a private act of parliament, 59 Geo. 3, c. 39, s. 88, on which no question was raised. Plea—Not Guilty.

It was proved that very offensive smells proceeded from the defendant's slaughtering house, to the annoyance of those who lived near it, and also of persons who passed along a turnpike road, leading from Battle Bridge to Holloway.

The defendant put in a certificate and license, under the statute 26 Geo. 3, c. 71, s. 1, authorising him to keep a house for the slaughtering of horses.

ABBOTT, C. J.—This certificate is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter horses in this very place, it would not entitle the defendant to continue the business there, one hour after it becomes a public nuisance to the neighbourhood. If a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road; in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other.

Verdict—Guilty.

Scarlett, Gurney and Adolphus, for the prosecution.

The defendant in person.

[Attornies—*Tims & Scadding*, and *Coleman*.]

1826.

Dec. 13th.

REX v. NEIL.

INDICTMENT for a nuisance, in carrying on the trade of a varnish maker, at Bell Isle, in the parish of St. Mary, Islington. This indictment also contained counts framed on the private act of Parliament, 59 Geo. 3, c. 39, s. 88, on which no question was raised.

For the prosecution it was proved that offensive smells proceeded from the defendant's manufactory, to the annoyance of persons passing along a road leading from Battle Bridge to Highgate.

The defence put in proof was, that the smells that proceeded from the defendant's manufactory, were not injurious to health; and, secondly, that at Bell Isle, and in the immediate neighbourhood of the defendant's manufactory, there were several houses for slaughtering horses, a brewery, a gas manufactory, a melter of kitchen stuff, and a blood boiler; and that although the accumulation of all the smells was offensive, yet that the defendant's alone would not have been so, and therefore was no nuisance.

To support an indictment for a nuisance, it is not necessary that the smells produced by it, should be injurious to health, it is sufficient if they be offensive to the senses,

ABBOTT, C. J.—It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff, &c. but the presence of other nuisances, will not justify any one of them; or the more nuisances there were, the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question therefore is this—Is the business as carried on by the defendant productive of smells offensive to persons passing along the public highway?

Verdict—Guilty.

Scarlett, Gurney, and Adolphus, for the prosecution.

Denman, C. S., and Chitty, for the defendant.

[Attornies—*Tims & Scadding*, and *Martin*.]

In the case of *Rex v. White and Ward*, 1 Bur. 337, Lord Mansfield lays down, that, to constitute a nuisance, "it is not necessary

that the smell should be *unwholesome*, it is enough if it renders the enjoyment of life and property *uncomfortable*.

1826.

Dec. 14th.

REX v. WATTS.

If by a private act of parliament, all houses for the slaughtering of horses within one thousand yards of a certain workhouse, are to be deemed public nuisances and removed; but if they existed before the act, the owners are to receive a compensation:—Held, that if an indictment be framed at common law with counts on that act, the defendant may be convicted if he so carried on the trade as to make it a public nuisance, and that he is not then entitled to any compensation.

INDICTMENT for a nuisance in using a certain house for slaughtering of horses. The first five counts were framed on a private act of Parliament, 59 Geo. 3, c. 39, s. 88, for keeping a slaughter house for the killing of horses, within one thousand yards of St. Pancras Workhouse; the sixth and seventh counts were for a nuisance at common law. Plea—Not Guilty.

It was proved that the defendant kept a slaughter house for the killing of horses, within eight hundred and forty-four yards of St. Pancras Workhouse, and it was also proved that smells proceeded from it, which were a great nuisance to persons passing along the adjoining highway.

Holt, for the defendant.—I submit that the defendant ought not to be convicted, because by the private act of Parliament, 45 Geo. 3, c. 99, §. 56 (a), it is enacted, that if any person should keep a slaughter house

(a) By the private act of Parliament, 45 Geo. 3, c. 99, s. 56, after reciting that “whereas it is of great consequence not only to the preserving of the health of the poor, who may be assembled in the said workhouse, [of the parish of St. Pancras,] but to the preventing of the spreading of contagious disorders, that no infectious, or noxious, or unwholesome trade or business should be carried on near to said workhouse; it is enacted ‘that if any person or persons shall keep or employ any house or place for the purpose of slaughtering or killing any horse, mare, or gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, or other cattle, which shall not be killed for butchers’ meat, or of boiling or preparing varnish, or oil, or of carrying on any other infectious, noxious, or unwholesome business, within the distance of one thou-

sand yards from the workhouse, to be erected by virtue of this act, every such house, or place, kept for such purpose, shall be deemed and taken to be a common and public nuisance, and shall and may be removed, taken down or abated, according to law, with respect to nuisances; and in case any person or persons, who before the passing of this act shall have erected, kept, used, and employed any house or place for any of the purposes aforesaid, shall think himself, herself, or themselves aggrieved by the removing or taking down of such house, or the abatement of such nuisance as aforesaid, it shall and may be lawful to and for the said directors, and they are hereby required, on application to be made to them at one of their meetings, by the party or parties considering himself, herself, or themselves aggrieved as aforesaid, to make such com-

for the slaughtering of horses, within one thousand yards of the workhouse, such house should be deemed a nuisance, and be removed according to law: but that section further enacts, that if any person had kept any such place for such purposes, before the passing of that act, and should be aggrieved by the removal of it, he should be entitled to a compensation, to be estimated in the manner there pointed out. Now, the defendant carried on the business before the passing of that act. It is true that the 88th section of the private act 59 Geo. 3, c. 39 (b); does not speak of any compensation; but it will be seen that that section applies only to persons who "*shall keep or use any house or place for the slaughtering or killing any horse, &c.*" which clearly relates

1826.
 REX
 v.
 WATTS.

pensation to such party or parties for the damage by him, her, or them sustained as above mentioned, as to the said directors shall seem reasonable; and in case such party or parties, and the said directors cannot agree as to the amount of any such compensation, then and in every such case, such compensation shall be ascertained and settled by a Jury, to proceed in like manner as hereinbefore directed with regard to making satisfaction and compensation to tenants for years, of any ground or buildings, required for the purpose of this act; and for the purpose of convening such Jury, it shall and may be lawful, to and for the said directors, to adopt the same form, and to use the same powers and authorities as they are hereinbefore in that respect authorised and empowered to adopt and use; and the money requisite for such satisfaction and compensation shall be paid out of the monies to be raised, levied, and collected in execution of this act, or which shall come to the hands of the said directors, or their treasurer by virtue thereof.' "

(b) The private act of Parliament 59 Geo. 3, c. 39, s. 88, which

repeals the former statute, after reciting, that "whereas it is of great consequence not only to the preserving of the health of the poor who may be assembled in the said workhouse, but to the preventing of the spreading of contagious disorders, that no infectious, noxious, or unwholesome trade or business should be carried on near to the said workhouse, enacts 'that if any person or persons *shall keep, use or employ* any house or place for the purpose of slaughtering or killing any horse, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, or other cattle, which shall not be killed for butchers' meat, or of boiling or preparing varnish, or oil, or of carrying on any other infectious, noxious, or unwholesome business, within the distance of one thousand yards from the workhouse, every such house and place, kept for such purpose, shall be deemed and taken to be a common and public nuisance, and shall and may be removed, taken down, or abated, and the person or persons who shall keep, use, or employ the same may be proceeded against by indictment or otherwise, according to law, with respect to nuisances.' "

1826.
 REX
 v.
 WATTS.

to persons who shall begin to keep such houses after the passing of this latter statute. The former statute, 45 Geo. 3, is indeed now repealed by the stat. 59 Geo. 3; but I submit that that earlier statute would still apply to all cases which occurred before the passing of the stat. 59 Geo. 3, which repealed it.

ABBOTT, C. J.—If the defendant's slaughtering house was so conducted as to be a public nuisance at common law, the parish might at any time have caused it to be removed, and I am clearly of opinion that in this case it was so conducted as to be a nuisance at common law, and that the defendant would not have been, and is not, entitled to any compensation.

Verdict—Guilty.

Scarlett, Gurney and Adolphus, for the prosecution.

Holt and Parke, for the defendant.

[Attornies—*Tims & Scadding*, and *Smith & Buckerfield*.]

Dec. 14th. **TOD and Others v. The Earl of WINCHELSEA and Others.**

To constitute a good attestation of a will of lands, it is not necessary that the testator should *actually see* the witnesses sign the attestations; it is sufficient if he were in such a situation that he *might see* them attest his will.

If on the evidence it appear that the testator was too weak to get out of bed, and it be doubtful whether the attestation was

ISSUE directed by Lord *Gifford*, late Master of the Rolls, to try whether the late Duke of Roxburgh devised his real estates or not.

The real question was, whether his will was duly attested under the statute of frauds.

It appeared that his Grace was ill at his house in St. James's Square, and that Mr. Dundas, an eminent writer to the signet at Edinburgh, drew his will. Sir Countts Trotter, who was one of the subscribing witnesses, stated that on the 19th of March, 1804, which was the night before his Grace's death, he was at his Grace's house in St. James's Square, to attest the will in question. The Duke was in bed, and the door was open between his Grace's

signed in the same room in which he was, or in the next room the door being open; it will be for the Jury to say, whether the will was attested either in the same room, or in such a part of the next room that the testator *might see* them sign the attestation: in either of those cases the attestation is good. But if the Jury should think that the attestation was signed by the witnesses at a part of the next room where the testator *could not see* them, that is not a good attestation, notwithstanding the door between the two rooms was open, and the testator might hear what the witnesses said in the next room, if they spoke in the ordinary tone of voice.

bed-room and a room called the writing-room. The Duke signed the will in bed, being supported with pillows; he was exhausted by signing his name to the first sheet, but his position being changed, he signed the others. After his Grace had signed the whole of the sheets of the will, Sir Coutts Trotter stated, that as far as he recollected, he took leave of the Duke, and himself with the other witnesses, and Mr. Dundas, then went into the writing-room, the door between the rooms remaining open, and that the witnesses signed their names to the attestation, on a table in the writing-room, but what sort of table it was, or where it stood, he could not remember. Sir Coutts Trotter also could not say whether the Duke could see them when they signed the attestation; nor did he then know that it was material that his Grace should do so; but the witness thought that a person in one of the rooms could hear what passed in the other, if the persons there spoke in the ordinary tone of conversation.

Mr. Baptiste, another of the subscribing witnesses, whose deposition taken on interrogatories was read, he being too ill to attend, stated, that he believed the will was attested in the room where his Grace was, but that he was not positive. It however appeared that when that witness made deposition as to the Scotch estates of the Duke of Roxburgh, he then thought the will was attested in the adjoining room. The other subscribing witness was dead.

It was proved, that as his Grace lay in bed, he could only see one end of the writing room; and that there were three tables in it, one in the middle of the room, which as he lay in bed he could not see, another which stood in a pier between two windows, which he could see as he lay in bed, and a third which was a moveable table running on castors, which he could also see as he lay in bed, if it was wheeled near the door, or to that end of the room where the pier table stood.

1826.
TOD
v.
WINCHEL-
SEA.

Tindal, S. G., for the defendants.—Upon this evidence

1826.
TOD
v.
WINCHEL
SEA.

it must be taken that the will was attested in the room adjacent to that in which his Grace lay in bed; and it must be proved to the satisfaction of the Jury, that the will was, in point of fact, attested by the witnesses in such a situation that the testator could see them sign their names. Now here, at the most, it is quite doubtful, because, if it was attested on the table in the middle of the room, as it most likely was, it was quite impossible for his Grace to see them; and if the Jury cannot say, on their oaths, that the will was attested where he could see the witnesses attest it, it is no more a valid will than if it had been attested by two witnesses instead of three.

Scarlett, in reply.—I submit that the witnesses might have attested the will on the pier table, or the moveable table, or that the testator might have got out of bed and come to the door of the writing-room, so as to have seen every part of that room. But I don't put it upon that. I contend, that although the attestation must be in the testator's presence, yet, that the word "presence," when you depart from the literal meaning, must be taken to mean this, that the will shall be attested before there is the opportunity of fraud, or unfair dealing, and that ocular presence not being necessary, if it is an unbroken action, and substantially in the same place, that is enough. If that is not so, to what extent are we to go? If all the parties had remained in the same room, and there had been a screen over which the testator could have looked, or if the bed curtains had been drawn, those would, either of them, have been sufficient. Now I submit that the witnesses, in this case, were virtually in the presence of the testator, during the whole time; he used both these rooms as a sick man, and none left the place till the whole was concluded. If the bed curtains were drawn, and the witnesses had remained in the room, that would have been good; why? because the testator might have drawn back the curtain: so here the testator might have got out of bed while they

were signing the attestation, and so have seen them at any part of the writing-room. Eye-sight is just as much excluded by a curtain as a wall, and the testator getting out of bed and looking through the door, is just as possible as drawing back the curtain. If the testator might see the attestation, that is enough, no matter whether he did or not; and it should not be forgotten that Sir Coutts Trotter proves that they were within hearing during the whole of the time.

1828.
 ToD
 " WINCHEL-
 SEA.

ABBOTT, C. J. (in summing up to the Jury)—The question is, whether this will was attested in the presence of the Duke of Roxburgh. By the stat. of King Charles the Second, it is required that the witnesses, who attest a will of lands, shall do so in the presence of the testator, and you have to consider whether they did so in this case. As to what shall be held to be "in the presence" of the party; it cannot be necessary that it should be in his sight, as the testator might have lost his sight, and in such cases other circumstances have been held to be sufficient. The rule to be drawn from all the decisions, which I mean to leave to you as the law, is this: was or was not the will attested by the witness in such a place that the Duke of Roxburgh *might* have seen what they were doing; I don't say that it is necessary that you should be satisfied that he *did* see them. If it were attested in the room in which he was, it is clear upon the cases that that is sufficient; if a table was brought to the door, he might then have seen; but if it was done on the table in the middle of the room, he could not. As to the supposition that he got out of bed, I think that there is no foundation for that, because he was assisted to rise in his bed, and was exhausted by the writing of his name the first time. One witness says, the will was attested in the room, but Sir Coutts Trotter thinks otherwise; and the former, on another examination, said, that he thought the will was attested in the next room. But it does not follow that the Duke could not see the attestation, because it was at-

1826.
 }
 TOD
 v.
 WINCHEL-
 SEA.

tested in the adjoining room. If it was executed at the pier table he might have seen it, or if the moveable table was placed in one part of the room, he might also have seen it. You will therefore have to say, whether the will was attested in the bed-room; if so, there is no doubt; but if you think it was attested in the other room, whether it was attested in such a part of that room that the testator *might* have seen the witnesses attest it: in either of those cases, the plaintiffs are entitled to a verdict. But if you think otherwise, I am opinion that in point of law you ought to find a verdict for the defendants.

Verdict for the plaintiffs.

Scarlett, Gurney, Jacob, and Jardine, for the plaintiffs.

Tindal, S. G., Denman, C. S., Brougham, S. M. Phillips and Stewart, for the defendants.

[Attornies—*Foss & Co.*, and *Rogers & C.*]

The authorities on this subject will be found collected in Powell on Devises, (Jarm. Edit.) from p. 80 to p. 112.

Dec. 15th.

HICKENBOTHAM v. GROVES and Others.

If A. let a house to B. with a covenant that the lease shall determine on B. committing any act of bankruptcy on which a commission of bankrupt should issue; and by

another deed of the same date, A. grants the use of the furniture to B. in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy: if B. become bankrupt, and the Jury find that B. was the reputed owner of the furniture, it will pass to the assignees notwithstanding these covenants; and if it be proved, on the one side, that several of the servants of B., and many of his customers knew that the goods belonged to A.; and on the other side, several of B.'s creditors prove that they considered the goods to belong to B., and gave him credit upon the faith of them; and that he acted as master of the house, &c. it will be for the Jury to say, whether B. was held out to the world as the owner of the goods, and obtained credit by the possession of them.

TRESPASS for breaking and entering the plaintiff's house, and taking away his goods. Plea—General issue.

It appeared that the plaintiff had been for some years the owner and occupier of the Petersburg Hotel, in Dover Street, Piccadilly; and that on the 29th of September, 1820, the plaintiff granted a lease of the hotel to a

person named Hodgson, for a term of fourteen years and three quarters, wanting ten days, at a rent of 400*l.* a year; and there was a covenant that the lease should be void in case that Hodgson should commit any act of bankruptcy, on which any commission of bankruptcy should issue. By another deed of the same date, the plaintiff granted to Hodgson the use of the furniture, &c. contained in the hotel, at a further sum of 600*l.* a year; and this deed also contained a covenant that Hodgson should be at liberty to purchase the goods, and also a covenant that his interest in the goods should be at an end, and be determined on his committing any act of bankruptcy, on which any commission of bankrupt should issue against him, and that the plaintiff should again resume the possession of the goods. In the month of March, 1823, Hodgson having become insolvent, a commission of bankrupt was sued out against him, on the petition of Joseph Gibson, and on this commission Hodgson was declared a bankrupt. Two of the defendants were appointed assignees under it, the other defendants were the solicitor, messenger, and others, persons acting under their authority. In the month of April, 1823, the plaintiff brought an ejectment to recover possession of the hotel, in consequence of the forfeiture of the lease by reason of the bankruptcy of Hodgson. In this ejectment judgment for the plaintiff was entered up, and possession delivered to the present plaintiff, under a writ of possession on the 13th of June, 1823. The plaintiff being thus in possession, the defendants, on the 16th of June, 1823, came to the hotel, and having broken in a panel of the door, took away the whole of the furniture of the hotel, which was the same that had belonged to the plaintiff, and had been used by Hodgson, under the deed of the 29th of September, 1820. They took the furniture, alleging that it had belonged to Hodgson, and that it had passed to his assignees. Some time after this the commission of bankrupt against Hodgson was superseded.

On these facts the plaintiff claimed a compensation for

1826.
HICKENBOTHAM
v.
GROVES.

1826.
 HICKENBOTHAM
 v.
 GROVES.

the injury done to his house, and to the furniture in the removal of it; and also for the loss occasioned to him by being deprived of the use of it for ten months, at the expiration of which period he had obtained the possession of it. In anticipation of the defence, it was proved by one of the waiters at the hotel, that he knew that the goods were the property of the plaintiff, and not of Hodgson; and that some of the other servants, and many of the customers of the house knew that also, but that other customers did not.

The defence as to the goods was this, that after the commission of bankrupt against Hodgson was superseded, another commission of bankrupt was sued out against him on the petition of the plaintiff, on which he was declared a bankrupt, and the plaintiff and another appointed assignees. And it was contended that Hodgson was the reputed owner of the goods, and that therefore the plaintiff could not recover for the taking of them; because, under the second commission, they had passed to the plaintiff and another as assignees of Hodgson: and it was further contended, that the covenant in the second deed of the 20th of September, could make no difference, if Hodgson was the reputed owner of these goods. To shew that he was the reputed owner of the goods, it was proved that when he took the possession of the hotel, the name of it was changed from the Petersburg Hotel to Hodgson's Hotel; and that the business was carried on for two years in his name, and four of the tradesmen with whom Hodgson dealt while he kept the hotel, proved that they considered him as the owner of the goods, and that they gave him credit on the faith of the property they saw in the house; and as a further proof that the plaintiff himself treated the goods as the property of the assignees of Hodgson under the second commission, it was proved, that he went with the messenger under that commission, and obtained possession of the goods from two of the defendants under the warrant of the commissioners acting under that commission.

Scarlett, in reply.—I submit that Hodgson was not to be considered as the reputed owner of these goods. If the goods had originally been Hodgson's, and he had executed a bill of sale of them, and still been allowed to have the disposition of them, then the case might have been otherwise; but here he had only a particular interest in them, and had no right to sell or dispose of them; and where the party has but the limited right of using the goods, and not the right of selling, pawning or disposing of them, he cannot be considered as the reputed owner of them. In the case of *Muller v. Moss* (a), it was held, that where a person bought a house and goods, and permitted the vendor to remain in possession for three months, the vendor was in possession of a distinct interest, and was not to be considered as the reputed owner of the goods; and further, I apprehend that when the plaintiff entered under the writ of possession, on the 13th of June, an end had been put to the deeds, and that the plaintiff was in possession as owner of the house and of all in it.

1826.
 HICKENBOTHAM
 v.
 GROVES.

ABBOTT, C. J. (in summing up to the Jury)—As to the breaking of the house, the plaintiff is entitled to a verdict; but the most important question in this case is, whether the goods are to be considered, in law, as the property of the plaintiff. The counsel for the defendants say, that this was a case of reputed ownership, and the question therefore is, whether these goods were suffered to be in the possession of Hodgson, in such a manner that he was the reputed owner of them. If you think that he was held out to the world as the reputed owner, and that he obtained credit from the possession of them, I am of opinion that, in point of law, they would pass to his assignees. It appears that Mr. Hickenbotham had kept this hotel, and that he granted a lease to Hodgson, in which there was a covenant that if Hodgson committed any act of bankruptcy, on which a commission of bank-

(a) 1 M. & S. 335.

1826.
HICKENBOTHAM
v.
GROVES.

rupt should issue, that the plaintiff should resume his possession. By another deed, Mr. Hickenbotham demised the furniture to Hodgson, who was to be at liberty to purchase it on certain terms set forth in the deed; and this deed also contains a clause that the plaintiff shall resume the possession of the furniture, if Hodgson should commit any act of bankruptcy, on which a commission should issue. But those were private contracts between these parties, and being unknown to the world, they will not help the plaintiff, if you think that these goods were in the order and disposition of the bankrupt. For two years the bankrupt lives in the house as the owner of it, his name is put up as the master of it, and he acts as such. It is true, that he told one of his servants that he had it as a ready furnished house, and also that many customers knew that, but many did not. But although the customers of the house might be aware of the fact, it does not follow that the world at large knew it; and those persons who did know it were all debtors of the house, and not creditors; and three or four of Hodgson's creditors prove that they gave credit to him as the owner of the property. The case cited was that of a house, which was a private dwelling; and what is most important, it was found as a fact, that the real ownership of the property was public and notorious. If that was known, nobody could be deceived, which is most material. When the first commission was superseded, there seems to have been nothing to prevent the plaintiff from claiming the goods, unless he felt that there was a difficulty about the reputed ownership; but instead of doing that, the plaintiff himself takes out a second commission against Hodgson, and under a warrant granted by the commissioners under that commission, he gets possession of the goods. This is a strong fact. Why should he have recourse to process under a second commission, if he were not conscious that he had put himself in such a situation as to let Hodgson appear as owner of the goods. This, however, is not conclusive, but is a strong fact for your consideration. But if you

think the reputed ownership made out, the plaintiff is still entitled to damages for the breaking of the house.

Verdict for the plaintiff, damages 40s. for the breaking of the house; and the Jury found that Hodgson was the reputed owner of the goods.

Scarlett, F. Pollock, Brougham, and Law, for the plaintiff.

Gurney, Denman, C. J., Curwood, Campbell, E. Lawes, and Alexander, for the respective defendants.

[Attornies—*Pope, and Walls.*]

In the case of *Muller, Assignee of Meek, v. Moss*, 1 M. & S. 335, there was an agreement between the bankrupt and the defendant, by which the bankrupt agreed, on payment of a certain sum, to convey to the defendant a dwelling house, and to deliver possession of all the household furniture and stock; and that after formal possession should be delivered to the defendant, the bankrupt should be allowed to remain in

possession for three months without paying rent. *This agreement was notorious in the neighbourhood, and on the exchange at Liverpool, on the day after it took place.* The money was paid by the defendant, and a formal delivery made to him, and the bankrupt left in possession according to the agreement. The bankruptcy occurred during the three months; and it was held, that this was not a reputed ownership in the bankrupt.

BEFORE MR. JUSTICE LITLEDALE.

(*Who sat for the Lord Chief Justice.*)

FARQUHAR and Others v. SOUTHEY and Others.

Dec. 16th.

ASSUMPSIT by the plaintiffs as indorsees of two bills of exchange, drawn by a person named Leader, and accepted by the defendants. The bills were each for 500l. one of them was dated June 3d, 1822, and payable three

An acceptor of a bill is not discharged by the bill not being presented for payment for three or four years after it becomes due,

He is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him.

1826.
 FARQUHAR
 v.
 SOUTHEY.

months after date; the other was dated June 16th, 1823, and payable at four months after date.

It appeared that Leader, the drawer of the bills, and the defendants had both kept accounts at the house of Messrs. Marsh & Co. as their bankers, up to the time when that house stopped payment, in the year 1824, when the defendants and Leader each opened an account with the plaintiffs. Leader generally owed the plaintiffs money, as they discounted bills for him, but sometimes his cash balance was as large as 1000*l.*; Leader paid these bills to the plaintiffs, who placed the amount to his credit, and charged him interest; but they did not call on the defendants, as acceptors, to pay them, till the month of May, 1826.

The defence was, that these were accommodation bills, and that the plaintiffs had discharged the acceptor by taking interest from the drawer, and by letting so long a time elapse before they called on the defendants; and the case of *Ellis v. Galindo*(a), was relied on.

The witness who was called to prove that they were accommodation bills, stated that there were dealings in trade between Leader and the defendants; and that sometimes they drew on him, and he accepted for their convenience, and sometimes they did so for his.

F. Pollock, in reply, contended on the authority of the

(a) Doug. 250 a. In this case the question was, whether something indorsed on the back of the bill ought not to have been left to the Jury, for them to say whether there had been an agreement to discharge the acceptor. In *Anderson v. Cleveland*, 13 East, 430 n. Lord Mansfield said, the acceptor of a bill, or maker of a note, always remains liable; the acceptance is proof of his having

assets in his hands, and he ought never to part with them, unless he be sure that the bill is paid by the drawer. And in the case of *Adams v. Gregg*, 2 Stark. 533, Abbott, C. J. intimated, that he thought a declaration made by A. (who had taken up the bill for the drawer,) that the acceptor should not be troubled, was not sufficient, in point of law, to discharge him.

cases of *Dingwall v. Dunster* (a), and *Atwood v. Crowdie* (b), that neither lapse of time, nor receiving interest from the drawer, would discharge an acceptor; and that nothing short of an express agreement that the defendants should be discharged from liability on the bills, would avail the defendants as a defence to the present action.

1826.
 FARQUHAR
 v.
 SOUTHEY.

LITLEDALE, J. — I think that these must be taken to be accommodation bills; but that there was cross paper passing between the defendants and Leader. These bills, it appears, get into the hands of the plaintiffs, who are bankers, and are discounted by them for Leader. Now these bills, though given for his accommodation, are binding on the acceptors; and unless there be something to discharge the acceptor, he is liable. The liability of an acceptor is different from that of a drawer or indorser. The acceptor is liable at all events, and is not discharged unless the bill be paid, or there be an express agreement to discharge him, or a distinct renunciation of his liability. The defendants

(a) Doug. 235 a. In this case it was held that no laches of the holder, and no forbearance to call on the acceptor for the amount of the bill, will discharge him.

(b) 1 Stark. N.P. C. 483. In this case the bills were drawn by Kent & Co., and accepted by the defendants, payable to Mattingley & Co., and by them indorsed to the plaintiffs. Mattingley & Co. who were country bankers, owed money to the plaintiffs, who were London bankers, and, being pressed by the plaintiffs, sent up the bills in question *for account*. These bills were accepted for the accommodation of Mattingley & Co.; and before the time when they became due, the cash balance at the plaintiffs' turned in favour of Mattingley & Co.

but the bills were not withdrawn; and the balance subsequently turned much against Mattingley & Co., and they failed. *Scarlett*, for the defendants, contended, that these bills were only sent to cover an existing balance which had been satisfied just before these bills became due. But Lord *Ellenborough* held, that, as the bills were sent on account, that meant the then floating account; and his Lordship said, "It is clear that there was a period when the plaintiffs' lien ceased to attach, and when the bills might have been redeemed; but they were not reclaimed; and by allowing them to remain in the hands of the plaintiffs the lien re-vested, when, upon fresh advances made, the balance turned in favour of the plaintiffs."

1826.
 FARQUHAR
 v.
 SOUTHEY.

put the case on two grounds: *First*, that the plaintiffs took interest on the bills from Leader. This is used to shew that they had discharged the acceptor; and, *secondly*, that there was no claim on the defendants till May last; and from this you (the Jury) are asked to infer that there was an agreement to discharge the defendants. I think that the charging interest by a man's own banker, who had advanced money on securities sent to him to be discounted, proves little as between indorsee and acceptor on the question whether the indorsee meant to discharge the acceptor; and as to the second point, that the plaintiffs did not present the bills to the defendants till May last, it is not at all required that they should do so: however, from this you are asked to infer an agreement by the plaintiffs to discharge the defendants. But why should they discharge the defendants? They had no sort of inducement to do so; and unless you (the Jury) think that there was a direct agreement by the plaintiffs to discharge the defendants, the plaintiffs are entitled to recover.

Verdict for the plaintiffs—Damages, 1000*l*.

F. Pollock and Henderson, for the plaintiffs.

Scarlett and Parke, for the defendants.

[Attornies—*Macdougall & Co.*, and *Rosser & J.*]

BEFORE LORD CHIEF JUSTICE ABBOTT.

REX v. TUCKER.

Dec. 18*th*.

If A. be indicted for perjury, in swearing that he did not

enter into a verbal agreement with B. and C. for them to become joint dealers and copartners in the trade or business of druggists; and it appear that in fact B. was a druggist, keeping a shop with which A. had nothing to do; but that A. and C., being sworn brokers, could not trade, and therefore made speculations in drugs in B.'s name with his consent, he agreeing to divide profits and loss with A. and C., this will not support the indictment, as this is not the sort of partnership denied by B. upon oath.

PERJURY.—The indictment stated, that William Hallett, on, &c., did exhibit his bill of complaint in the Court

of Chancery, &c., “ and that the said bill of complaint was in due manner amended; and that the said William Hallett, in and by his said original and amended bill of complaint, did set forth and shew, amongst other things, that in or about the year 1813, he the said William Hallett and Thomas Bowden, and Jonathan Tucker, entered into a verbal agreement *to become joint dealers and co-partners in the trade or business of druggists*, and the purchase and sale of drugs and merchandizes connected with such trade, and to divide the profits arising therefrom in equal shares and proportions;” and (after stating several other clauses of the bill) “ that the said Jonathan Tucker did falsely, &c. depose and swear in writing, amongst other things, in substance and to the effect following, that is to say, ‘ Saith, he (meaning himself, the said Jonathan Tucker), denies it to be true, that in or about the year 1813, or at any other time, the said complainant, (meaning the said William Hallett) and Thomas Bowden, one of the defendants in the said bill named, (meaning the before-named Thomas Bowden) and this defendant, (meaning himself, the said Jonathan Tucker), did enter into a *verbal agreement to become joint dealers in the trade or business of druggists, and in the purchase and the sale of drugs and merchandize connected with such trade, and to divide the profits arising therefrom;*’ ” and on this the perjury was assigned, “ that the said William Hallett, Thomas Bowden, and Jonathan Tucker, did, in or about the year 1813, enter into a verbal agreement ‘ to become joint dealers in the trade or business of druggists, &c.’ ” exactly following the words of the answer. Plea—Not Guilty.

The bill and answer were put in; and from the evidence of Mr. Hallett it appeared, that he had for many years carried on an extensive business as a druggist, and had a shop in St. Mary Axe; and that the defendant and Mr. Bowden were drug brokers, and had nothing whatever to do with this shop or the drugs sold there; but that Messrs. Tucker and Bowden were continually in the drug market,

1826.
 Rex
 v.
 TUCKER.

1826.
REX
v.
TUCKER.

and conversant with the state of it; but, being brokers of the city of London, they could not deal in their own names; and it was therefore agreed that they should purchase large quantities of drugs in the name of Hallett & Co. (under which name the prosecutor traded) and sell them again. Mr. Hallett and Messrs. Tucker & Bowden dividing the profits. Mr. Hallett further stated, that a separate account was kept of the drugs which were bought by Messrs. Bowden and Tucker to be sold in his shop; and that the drugs bought on the joint speculation were bought in his name only, Bowden and Tucker being sworn brokers, and not allowed to buy in their own names; but that on all these latter transactions he and the brokers divided profit and loss.

ABBOTT, C. J., (addressing the counsel for the prosecution)—Is not this case at an end? Your allegation in the bill is, that these parties became partners in the trade and business of druggists. Mr. Hallett was a druggist by trade: he had a shop and warehouse in which he carried on that trade, and with which the defendant had no concern whatever; but, being a broker, he had an opportunity of knowing what was going on in the trade. Now, he could not buy and sell in his own name; and the account given by Mr. Hallett is, that the defendant was to buy and sell in his (Hallett's) name, and that then they were to divide the profit and loss. Now, I wish to know if that is the sort of partnership alleged in the bill in Chancery: for if this is not such a partnership as is there predicated, there is an end of this indictment. I do not take on me to say, that if a bill had been filed, stating the facts which Mr. Hallett has alleged, that a Court of Equity would not decree an account of such a transaction, because I am not a Judge of a Court of Equity; but I am clearly of opinion, that in your pleadings you must state the partnership as it was. Now this allegation could only apply to an ordinary partnership, and not to such a transaction as this. It

would have been a very different thing if Mr. Tucker had not been a broker, and had not been prohibited from buying in his own name; but, looking at the bill, a person would suppose it was the carrying on of a regular trade; which turns out on the evidence not to be the case.

1826.
 REX
 v.
 TUCKER.

Verdict—Not Guilty.

Gurney and Adolphus, for the prosecution.

Scarlett, Denman, and Platt, for the defendant.

[Attornies—*Amory & Coles*, and *Warne & Son*.]

BERRY v. ADAMSON, Gent., One, &c.

Dec. 18th.

CASE for a malicious arrest. The first count of the declaration stated that the defendant, not then having any probable cause of action against the plaintiff, &c., and intending to harass, &c., maliciously caused a certain writ, &c., called an attachment of privilege, &c.; and before the delivering of that writ to the sheriff “falsely and maliciously, and without having any reasonable or probable cause of action against the plaintiff, to the amount of 10*l.* or upwards, caused and procured the said writ, and the same was marked and indorsed for bail for 90*l.* and upwards, being so marked and indorsed for bail, the said defendants afterwards, and before the return thereof, to wit, on, &c., at, &c., contriving and intending as aforesaid, and without having any reasonable or probable cause of action whatsoever against the said plaintiff, to the amount of 10*l.* or upwards, falsely and maliciously *caused the said plaintiff to be arrested by his body*, under and by virtue of the said writ, *and to be thereupon imprisoned, and kept and detained in prison for a long space of time, to wit, for the space of three days then next following, and until the said plaintiff, in*

If a sheriff's officer send his servant to a party, to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and execute a bail bond, this is not an arrest.

A person may, on a declaration properly framed, recover for being maliciously held to bail, if he gave bail to prevent being arrested.

In a declaration for a malicious arrest, an allegation that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison, until, in order

to procure his release, he was forced to procure bail, is not a divisible allegation; and if there was a giving bail proved, but no evidence of any arrest, that is not sufficient.

1826.
BERRY
v.
ADAMSON.

order to procure his release from his said imprisonment, was forced and obliged, and did then and there procure certain persons, to wit, W. W. and J. C., to become bail for the appearance of him the said plaintiff in the court, &c. to answer, &c. The count then proceeded to state the termination of the suit. The second count was precisely similar, except that it varied the mode of stating the termination of the suit. Plea — General issue.

The affidavit of debt was put in, and also the attachment of privilege, which was indorsed “Oath for 90*l.* and upwards.” The bail bond was also put in; but the sheriff’s officer stated, that he did not arrest the plaintiff; but that, at the defendant’s desire, and to avoid putting the plaintiff to inconvenience, he sent his servant to inform the plaintiff that a writ was out against him, and that he must give bail to it; and the officer further stated, that the plaintiff came to his house with his bail, and executed the bail bond. And it was proved by the officer’s servant, that he went to the plaintiff’s house and delivered the message as he was directed.

Scarlett, for the defendant. — I submit that the plaintiff must be called. This is an action for maliciously arresting the plaintiff and holding him to bail. The allegation in the declaration is, that the defendant maliciously caused and procured the plaintiff to be arrested by his body, and imprisoned, till he was forced to give bail to procure his release. The arrest being the gravamen of the charge, all the rest is consequential. Now here, so far from proof of any arrest, the direct contrary is proved.

Brougham, for the plaintiff. — The circumstance that there was no actual arrest, makes no difference. If the plaintiff was held to bail, he was in custody of his bail. No doubt a count might have been framed so as to obviate the objection. But in 2 Wm. Saund. 59 a, it is laid down, that in an action on a bail bond, it is not necessary to lay

an arrest; and that if an arrest is alleged, it would not be traversable.

1826.
BERRY
v.
ADAMSON.

ABBOTT, C. J.—For the purposes of that action, the party is estopped by his bond from denying it.

Brougham.—If the declaration alleged an arrest and imprisonment, and stopped there, that would be supported by proving that the party was held to bail. Another view of the case that I would submit is this: If your Lordship omit the allegations about the arrest, it will stand thus: That by means of the process, the defendant maliciously forced the plaintiff to procure bail; and if he maliciously caused him to be held to bail, that is enough.

Chitty and *Abraham*, on the same side.—An actual touching is not now necessary to constitute an arrest. If the party acquiesces in the arrest, it is enough; and here the plaintiff did so by giving bail; and further, the allegation is divisible; and the maliciously causing a man to put in bail, is of itself actionable.

Scarlett, in reply.—In the case of *Arrowsmith v. Le Mesurier* (a), it was held, that where an officer told a man that he had a warrant against him, and the man went with him to a police office, this was no arrest: and suppose the plaintiff's attorney had sent a bailable writ to the office of the defendant's attorney, and he had put in bail, without the defendant's knowing any thing about it, that would not be an arrest. No doubt, if a man maliciously caused another to sign a bail bond, an action might be framed for that; but here the plaintiff alleges a bodily arrest, and the very contrary is proved.

ABBOTT, C. J.—If the allegation of the arrest is left out, the declaration is hardly intelligible without it.

(a) 2 N. R. 211.

1826.
BERRY
v.
ADAMSON.

Scarlett. — Your Lordship is not called upon to decide whether a man can maintain an action without being arrested.

ABBOTT, C. J. — I have no doubt that a man might recover in an action, if he were held to bail maliciously, and gave bail to prevent being arrested, if the declaration were properly framed.

Brougham. — In the case cited, the party went voluntarily before the magistrate.

ABBOTT, C. J. — In consequence of the warrant which was in the hands of the constable. That is a stronger case than the present, as the officer's man, who went with the message in this case, had no warrant. Suppose there had been no writ, or the writ had been set aside, could the plaintiff have maintained an action for false imprisonment? There is a great difference in the gravamen, whether you arrest a man, or tell an officer to send to him to come and sign a bail bond, and not put him to inconvenience. I think the plaintiff must be called.

Nonsuit.

Brougham, Chitty, and Abraham, for the plaintiff.

Scarlett, Campbell, and D. F. Jones, for the defendant.

[Attornies—*T. W. Robinson, and Adamson.*]

IN the ensuing Term, *Brougham* moved to set aside the nonsuit on two grounds: *First*, That there was a sufficient arrest to support that allegation in the declaration; and *secondly*, That if there was not, the averment was divisible, and it was sufficient to prove a wrongful holding to bail.

The Court refused the rule on the second ground, being of opinion that the allegation was not divisible; but granted a rule to shew cause on the first point: but that rule was,

after argument, discharged, the Court being of opinion that there was no sufficient arrest to support the allegation.

1826.

BERRY

v.

ADAMSON.

See the case of *Russen v. Lucas* and Another, *ante*, Vol. 1, p. 153, and the note to that case.

In the case of *Williams v. Jones*, Ca. temp. Hard. 301, Lord *Hardwicke* says, that it does not follow that an arrest cannot be made without touching the person; for if a bailiff comes into a room and tells the defendant he arrests him, and locks the door, that is an ar-

rest; for he is in custody of the officer.

In the case of *Blatch v. Archer*, Cowp. 65, Lord *Mansfield* lays down, that an arrest must be by the *authority* of the bailiff, but he need not be the hand that arrests; nor need he be in the presence, nor actually in sight, nor within any precise distance of the person arrested.

MAINWARING v. LESLIE.

Dec. 20th.

ASSUMPSIT for goods sold and delivered.

The plaintiff was a linen draper, and the demand was for articles bought by the defendant's wife at the shop of the plaintiff. It appeared that the wife at the time was not living with the husband, but residing in lodgings in Panton Street, in the Haymarket; and the woman, at whose house she lodged, proved that several times, both before and after the delivery of the goods in question, she and the witness went together to the defendant's house, where the wife saw him, and staid there sometimes as long as half an hour.

If a tradesman bring an action against a husband for goods furnished to his wife, while she was living apart from her husband, it is for him, the tradesman, to shew that her so living proceeded from some cause which would justify it.

Scarlett, for the defendant, submitted that the plaintiff must be nonsuited upon this evidence.

ABBOTT, C. J., assented.

Brougham for the plaintiff.—Is it not for them to shew that the wife was improperly absent from her husband's house? She is proved to have gone there several times, both before and after the purchase of these goods.

1826.
MAINWARING
v.
LESLIE.

ABBOTT, C. J.—It does not appear for what purpose she went on the occasions mentioned. If you furnish goods to a married woman, when she is not living with her husband, it is for you to shew, that she was absent from some cause which would justify her absence. She might, for aught we can tell, have gone away of her own accord.

Brougham then called back the witness who had proved the occasional visits; and she said, upon further examination, that the wife once, during the time in which the goods were furnished, left her lodgings at the witness's house, and *resided* for some time at the house of her husband, but afterwards returned again to the house of the witness.

ABBOTT, C. J.—Upon this evidence I think it stands worse for you than it did before.

Brougham.—I submit that this evidence shews, that the public would be justified in concluding that she was living apart from her husband with his consent.

ABBOTT, C. J.—I think it is perfectly clear that she was living apart from her husband against his consent, and therefore that the plaintiff is not entitled to recover. If a contrary doctrine were to be holden, many a man might be ruined.

Nonsuit.

Brougham and *Erle* for the plaintiff.

Scarlett, for the defendant.

[Attornies—*J. Vickery*, and *Richardson & T.*]

1826.

HOLLIDAY v. MANN and Another.

Dec. 21st.

TROVER for flour.—The plaintiff claimed under a person named Cant, who had parted with the flour to him, partly in discharge of a debt and partly for cash. Cant was in possession of the bill of lading, which he indorsed to the plaintiff. The defendants were wharfingers to a miller named Branford, of whom Cant had purchased; and the defence was, that Cant had promised to pay for the flour by a Bank Post Bill, but instead of so doing, when he found that it had been shipped, sent only his own promissory note; and that the plaintiff had purchased of Cant under circumstances which evinced a knowledge of his (Cant's) inability to pay. In addition to evidence of the plaintiff's having said that it was of no use to bring an action against Cant for non-performance of his contract, because he was not worth two-pence, a witness was called to shew the insolvent state of Cant's circumstances.

Where goods have been sold by a miller under circumstances which give him the right of refusing to deliver them, evidence of the insolvent state of the buyer's circumstances cannot be received in an action of trover, brought by the indorsee of the bill of lading against the wharfingers of the miller, unless such evidence can be brought home to the knowledge of the plaintiff.

ABBOTT, C. J., inquired if the facts which the witness was about to prove, could be brought home to the knowledge of the plaintiff. And upon being answered in the negative, his Lordship held that the evidence was not admissible.

Verdict for the defendants.

Campbell and Abraham, for the plaintiff.

Gurney and C. H. Sheppard, for the defendants.

[Attornies—*Harmer*, and *Mann*.]

1826.

Dec. 21st.

HUTTMAN v. BOULNOIS, the Younger.

If a clerk be engaged at a salary of 100*l.* a-year, and having received his wages up to a certain time, serve for some time longer, and then leave the service before the year expires, without due cause, and without any notice; whether he is entitled to recover wages up to the time of his quitting, *Quære*: at all events, he is liable to a cross action for leaving the service without notice.

ASSUMPSIT for wages as a clerk. There was no evidence of any hiring, but proof was given of a service by the plaintiff for seven months, and also that his salary was to be 100*l.* a-year. Payments had been made him up to the month of November, 1825. He quitted in January, 1826, and sent a letter to the defendant, in the following terms:

“ Mr. W. Boulnois, Junr.

“ January 3d, 1826.

“ Sir,—I sincerely regret being compelled to absent myself from your office, and to resign my present situation.
 “ The abruptness with which I do this will, I am aware,
 “ be deemed unpardonable, but I have no other course to
 “ take, so many things stare me in the face which are un-
 “ done, and so many difficulties do I anticipate, which I
 “ am quite unable to accomplish, that I am in some measure
 “ bewildered by the thoughts of them, and unable to per-
 “ form those duties which require immediate attention.
 “ Another cause is of a more personal nature, and relates
 “ to the manner of correction, for which I have the great-
 “ est dread, &c. &c.

The letter concluded with a statement of the petty cash account, but contained no demand for wages.

Between the day when the plaintiff left, and the 22d March, various applications were made both by himself and his friends, for the payment of his salary, which the defendant uniformly refused to attend to. On the 22d of March, the plaintiff wrote to the defendant, threatening to make known some circumstances connected with his commercial transactions, which would make the defendant regret that he had ever deprived him of his salary. The defendant was stated to be a person of a very violent temper. The sum claimed was 15*l.*, being from the 9th November, 1825, to the 2d January, 1826.

Scarlett, for the defendant.—Every species of hiring, where no time is specified, is by law a hiring for a year, and therefore the plaintiff in this case was bound to serve for a year, or shew some reason which would justify his leaving earlier. Now the reason which he gives is, that he is unable to perform the duties of his situation. This is the reverse of a sufficient reason; and therefore I submit that he ought to be nonsuited.

1826.
HUTTMAN
v.
BOULNOIS.

ABBOTT, C. J.—It appears that the plaintiff leaves his service without notice before the expiration of the year, saying nothing about salary, and claiming nothing at that time. He afterwards threatens his master to expose him if he does not pay him his demand. On both these grounds I am clearly of opinion that he is not entitled to recover.

Campbell for the plaintiff.—There is no evidence to shew a yearly hiring. It is laid down by Lord *Coke*, that servants in husbandry are hired by the year. But in other services there is no such law. For instance, in the case of a footman, he is not bound to remain a year in his place, nor is his master obliged to keep him for a year. It is in proof that wages were paid to the plaintiff up to November, 1825, and therefore the presumption of there being a yearly hiring is rebutted, for, in such case, his wages would not be due till the end of the year. Suppose a clerk remains with his employer three hundred and sixty-four days, and then goes away, does he forfeit the whole of his wages by not stopping the remaining day? The plaintiff was hired at the rate of 100*l.* a-year, and he is entitled to a proportion of that sum for the seven months during which he served.

ABBOTT, C. J.—I must take it that the hiring in this case was a hiring for a year. The doctrine that a general hiring is a hiring for a year, is not confined to servants in husbandry, but extends also to domestic and other ser-

1826.
 HUTTMAN
 v.
 BOULNOIS.

vants, and it is on that ground that many of our settlement cases are decided. The plaintiff was in the situation of a clerk and had to maintain himself, and he received the money up to November for the purpose of enabling him so to do. I am of opinion, that having left his service before the expiration of the year, without reasonable cause, he is not entitled to recover any thing.

Nonsuit.

Campbell and *Platt*, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*T. Miller*, and *P. Lewis*.]

1827.

Jan. 24th.

IN the ensuing Hilary Term, *Campbell* obtained a rule *nisi* for setting aside the nonsuit and entering a verdict for the plaintiff, for the sum of 15*l*.

May 23rd.

This rule came on to be argued. *Scarlett*, A. G., shewed cause.—The law implies a hiring for a year, if there be an indefinite hiring. In London, by custom, among domestic servants, they may leave at a month's notice (*a*); but in this case there was no notice at all, and the hiring being a yearly one, neither party can compel the other to perform the contract, unless he himself is willing to perform his own part of it.

Campbell, in support of the rule.—I submit that the fair understanding is, that either party might dissolve the contract on reasonable notice; and that if no notice be

(*a*) *Robinson v. Hindman*, 3 Esp. 235. In this case Lord *Kenyon* held, that if a master turns away his servant without previous notice or warning, and there is no fault or misconduct in the servant to warrant it, the servant is entitled

to a month's wages from general usage, without any specific agreement. But if there be misconduct on the part of the servant, he may be discharged without warning, and is not entitled to recover the month's wages.

given, that will not cause a forfeiture of the by-gone wages, but only make the plaintiff liable to a cross action for leaving the service without notice.

1826.
HUTTMAN
v.
BOULNOIS.

LORD TENTERDEN, C. J.—Had the plaintiff received any wages?

Campbell.—He had, my Lord, and I conceive the wages to be payable *de die in diem* for the plaintiff's support. I will cite what was allowed by Mr. Baron *Wood*, when at the bar, in a case of *Cutter v. Powell* (a); for what a great counsel admits against his own client, may be taken to be very good law. His words are: "In the common case of service, if a servant, who is hired for a year, die in the middle of it, his executor may recover part of his wages, in proportion to the time of service" (b). And in that case Mr. Justice *Lawrence* lays down, that with regard to the common case of a hired servant, such servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he serves, though he do not continue in the service during the whole year.

LORD TENTERDEN, C. J.—As you must admit that the defendant has a right to bring a cross action, would it not

(a) 6 T. R. 323.

(b) For the old law, which was otherwise, see Bro. Abr. *Appor-tionment*, pl. 13. Ib. *Laborers*, pl. 48. Ib. *Contract*, pl. 31. *Worth v. Viner*, 3 Vin. Abr. 8 & 9.

In the case of the Countess of *Plymouth v. Throgmorton*, 1 Salk. 65, the plaintiff declared in debt upon a writing, whereby the defendant's testator had appointed the plaintiff's testator to receive his rents, and promised to pay him

100*l.* per annum for his service. The defendant's testator served three-fourths of a year and died, and the action was brought for 75*l.* for those three-fourths. *Holt*, Serjt., objected, that without a full year's service nothing could be due, and that it was in the nature of a condition precedent: and of that opinion were the Court. See the case of *Pagani v. Gandolfi*, ante, p. 370.

1826.
 HUTTMAN
 v.
 BOULNOIS.

be better to take 15*l.* without costs, upon the understanding that no cross action shall be brought.

This proposition was acceded to, and the Court directed that the rule should be discharged upon payment of 15*l.*, without costs; a *stet processus* entered, and no cross action brought.

Dec. 23rd.

PERCIVAL v. BLAKE.

If a person purchases an article, and suffers it to remain on his premises for two months without examination, and then finds it to be unfit for use, he cannot, after that length of time, avail himself of the objection in answer to an action for the price, unless some deceit has been practised with regard to the article.

ASSUMPSIT for goods sold and delivered. Plea—*Non assumpsit*. The action was brought to recover a sum of 24*l.* as the price of an iron vat.

For the plaintiff, it was proved, that he was a soap boiler, and was also in the habit of buying iron vats at public sales, and disposing of them by private contract. That the defendant, in the month of March, 1825, went to the plaintiff's premises for the purpose of purchasing a vat; that he remained there about ten minutes; that he looked at the vat in question, which was lying on its side in a yard; that the vat was delivered at the defendant's premises; that he did not say it must be warranted sound; and that he had been several times applied to for payment of the price, and made several excuses, and several promises to pay. A letter also from the defendant, dated the 27th of May, 1825, in the following terms, was put in and read:—

“ Sir,—I am just come to town, and in answer to your
 “ letter of the 10th inst. I can only say, that the amount
 “ shall be left out for you on my return from the city to-
 “ morrow after 2 o'clock.”

For the defendant, the following letter, written by the plaintiff to him on the 21st of January, 1825, was given in evidence:—

“ Sir,—Your's, dated January 20th, 1825, duly came
 “ to hand, offering 22*l.* for iron vat, which I cannot

“ take. It is the finest vat on the ground; the lowest will
 “ be 25*l.*, *delivered safe and sound.* I am well satisfied it
 “ will be cheap to you, and I can assure you, with the ex-
 “ penses, it stands me in 22*l.* 10*s.* If you look at it again
 “ I am sure you will think it well worth your money.”

1826.
 PERCIVAL
 v.
 BLAKE.

Witnesses were also called, who proved that they went in March, 1825, to look at the vat on the plaintiff's premises. That there were two other vats inside it, which could not easily be removed, and they were therefore unable to examine the inside of the bottom. That there was a good deal of dirt over the outside of the bottom, which prevented the discovery of any imperfection. That in the following May they examined the vat again, and used a hammer and chissel, by means of which they found that the iron work of the bottom, which ought to have been three inches thick, was only three-fourths of an inch, and had also a hole which went quite through. That the thickness of three inches was made up by bricks, covered with cement, and that it was *totally unfit for the defendant's business*, he being a maker of vinegar and what is called iron liquor, and requiring vats which would stand a very strong heat. It was also proved that the vat never was sound, having missed in casting, and that on that account it was sold for 20*l.* when new; whereas, if it had been perfect, it would have cost 48*l.* That it was cast in 1815, and had been sold to the plaintiff, together with an iron receiver, for 11*l.*, at the sale of a Mr. Roobard, on whose premises it had been used for three years, merely as a receiver for cold soap lees. The examination in May did not take place till the day after the letter promising payment was sent; and on that day, when the plaintiff's son called to receive the money, he was told that the vat was unsound, and was requested to send for it back. One of the witnesses stated, that about a fortnight after the defendant bought the vat, the plaintiff told him, the witness, that it was a sound one.

1826.
PERCIVAL
v.
BLAKE.

ABBOTT, C. J., in his summing up, said,—The letter promising payment appears to have been written more than two months after the vat was delivered, and therefore it seems to me that unless the defendant has shewn that some deceit was practised, either by the plaintiff himself or some other person, with regard to the vat, his objection comes too late; for a man ought to make his objections within a reasonable time, and I think an interval of two months is too long. His Lordship, after reading and commenting upon the evidence, concluded his observations by saying,—The question is, taking all this into consideration, whether a deceit was practised on the defendant, and whether he had not a right, at the time of the purchase, to imagine that he was purchasing an iron vat with an iron bottom, of a competent thickness. Add to this, that the plaintiff in his letter greatly misrepresents the price. If you think that any deceit was practised, then you will find your verdict for the defendant. But if you think that the defendant ought to have found out the state of the vat at the time of sale, or that he ought to have made the discovery earlier, then you will find for the plaintiff, and give him 24*l*.

The Jury found for the defendant, saying at the same time, that they wished it to be understood, that there was not any wilful misrepresentation on the part of the plaintiff.

Marryatt and Campbell for the plaintiff.

Denman, C. S. and Payne, for the defendant.

[Attornies—*Argill & M.*, and *Cranch*.]

1827.

REX on the Prosecution of Messrs. JACOB & CAMPBELL
v. D. PRINCE.

Jan. 10th.

INDICTMENT on the stat. 52-Geo. 3, c. 63, intituled
“An Act for more effectually preventing the embezzlement
of securities for money and other effects, left or deposit-
ed for safe custody, or other special purpose, in the
hands of bankers, merchants, brokers, attornies, or other
agents.”

The statute of
the 52 Geo. 3,
c. 63, for pre-
venting the em-
bezzlement of
securities,
by agents &c.
applies only to
persons to whom
such securities,
&c. are entrust-
ed, in the exer-
cise of their func-
tion or business.

Mr. Jacob, one of the prosecutors, stated, that he was in
partnership with Mr. Campbell, and that in the month of
October, 1825, Prince, the defendant, came to him in a
friendly way, and told him, that as money would soon be-
come rather scarce, if he had any engagements to meet he
had better provide the money in time; and added, that if
he would draw bills on Mr. Henry Hughes, he (Prince)
would get them discounted for him, and hand the money
over. He then drew a bill for 1566*l.* 4*s.*, which Prince
got discounted, and paid over the produce. Another bill
was then drawn for 1681*l.* 5*s.*, which was given to Prince,
to get it discounted, but which he had not returned.

The witness, in his cross-examination, said, that Prince
was a general merchant, that he had known him fifteen
years, and during that time had had a great many *friend-
ly transactions* with him, and had given and received ac-
commodation to a very large amount.

ABBOTT, C. J.—On looking at this act of Parliament, I
very much doubt whether it applies to a case like the pre-
sent; for this is the case of a deposit with *a private friend*,
and the act recites that it is expedient that due provision
should be made to prevent embezzlement by persons *en-
trusted by their customers and employers (a)*.

(a) The words of the recital are: vent the embezzlement of Govern-
“Whereas it is expedient, that due ment and other securities for mo-
provision should be made, to pre- ney, plate, jewels, and other per-

1827.
 REX
 v.
 PRINCE.

Denman, C. S.—The words of the statute include agents; and I submit, with the greatest confidence, that the defendant in this case must be considered as an agent for the purpose of getting the bill discounted.

Platt, on the same side.—If the Legislature had had this particular case in view, the words used could not have been more general. The enacting part does not refer to the recital. The words there used are not “agents of the description aforesaid,” but they are “agent or agents of any description whatsoever” (*b*). If it was not intended

sonal effects, deposited for safe custody, or for any special purpose, with bankers, merchants, brokers, attornies, and other agents, entrusted by their customers and employers.”

(*b*) The enacting part in the first section is—“That if any person or persons, with whom (as banker or bankers, merchant or merchants, broker or brokers, attorney or attornies, or agent or agents of any description whatsoever) any ordinance, debenture, exchequer bill, navy, victualling or transport bill, or other bill, warrant or order for the payment of money, state lottery ticket or certificate, seaman’s ticket, bank receipt for payment of any loan, India bond or other bond, or any deed, note or other security for money, or for any share or interest in any national stock or fund of this or any other country, or in the stock or fund of any corporation, company or society established by act of Parliament or royal charter, or any power of attorney for the sale or transfer of any such stock or fund, or any share or interest therein, or any plate, jewels

or other personal effects, shall have been deposited, or shall be or remain for safe custody, or upon or for any special purpose without any authority, either general, special, conditional or discretionary, to sell or pledge such debenture, bill, warrant, order, state lottery ticket or certificate, seaman’s ticket, bank receipt, bond, deed, note or other security, plate, jewels or other personal effects, or to sell, transfer or pledge the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, shall sell, negotiate, transfer, assign, pledge, embezzle, secrete or in any manner apply to his or their own use or benefit, any such debenture, bill, warrant, order, state lottery ticket or certificate, seaman’s ticket, bank receipt, bond, deed, note or other security, as hereinbefore mentioned, plate, jewels or other personal effects, or the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, in violation of good faith, and contrary to the special purpose, for

to apply to a case like this, then those general words might have been left out.

1827.
 }
 REX
 v.
 PRINCE.

ABBOTT, C. J.—From the expression of the object of the act of Parliament, as described in the recital, it seems to me that it was the intention of the Legislature to apply the criminal remedy to the case of persons, who, *in the exercise of their function and business* should be entrusted with securities, &c. The question is, whether persons materially assisting and accommodating each other are within the act. On the part of the prosecution, it is said, that if the words “agent or agents of any description whatsoever,” were not meant to apply to all cases, they might as well have been left out; but on the other hand, it may be said, that if the statute was intended to apply to all persons as agents, then the words “bankers, merchants, brokers and attornies,” might have been omitted altogether; and they would have been so, if it had not been intended to confine the provisions of the statute to the cases there mentioned. I am of opinion that this case is not within the particular act of Parliament. It is always important to see that cases of such a description are brought, not merely within the letter, but within *the spirit*

which the things hereinbefore mentioned, or any or either of them, shall have been deposited, or shall have been or remained with or in the hands of such person or persons, with intent to defraud the owner or owners of any such instrument or security, or the person or persons depositing the same, or the owner or owners of the stock or fund, share or interest, to which such security or power of attorney shall relate, every person so offending in any part of the United Kingdom of Great Britain and Ireland, shall

be deemed and taken to be guilty of a misdemeanor, and being thereof convicted according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on a person or persons guilty of a misdemeanor, and as the Court before which such offender or offenders may be tried and convicted shall adjudge.”

By the stat. 7 & 8 G. 4, c. 27, this act is repealed, but by the 7 & 8 G. 4, c. 29, its provisions are in substance re-enacted.

1827.
 REX
 v.
 PRINCE.

and meaning of the act, before a party is pronounced to be guilty.

The Jury then, under his Lordship's direction, found the defendant

Not Guilty.

Denman, C. S., and Platt, for the prosecution.

Scarlett and Andrews, for the defendant.

[Attornies—*Harmer*, and *Kearsey*.]

BEFORE MR. JUSTICE BAYLEY.

(*Who sat for the Lord Chief Justice.*)

Jan. 11th.

BURTON v. PAYNE and Another.

If a check, drawn by one of the parties in a cause, be proved to be in the hands of the banker of such party, (having been paid), the opposite party need not, if he wishes to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce.

ASSUMPSIT.—The question in dispute in the cause was as to the partnership of the defendants.

To shew a joint payment by them, *Gurney*, for the plaintiff, called for the production of a check, which a witness stated was in the hands of the defendant's bankers.

Scarlett, for one of the defendants, objected, that the plaintiff's counsel ought to call the banker's clerk to produce it.

BAYLEY, J.—The bankers are your agents. You would have a right to go to the bankers and demand the check of them.

Gurney, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Golding*, and *Sloper*.]

BEFORE LORD CHIEF JUSTICE ABBOTT.

1827.

REX on the Prosecution of WILLIAM CLARK v. RICHARD DIXON MOTT, WILLIAM IRELAND, and PETER STAINSBY.

Jan. 18th.

THE indictment, which consisted of twenty-four counts, in the first nineteen stated, in substance, that a certain joint stock Company *had been* established, called the Imperial Plate Glass Company, the capital of which, it had been ordered and appointed, should consist of 2000 *shares*; and went on to charge the defendants with conspiring to make and fabricate a great number of other shares in addition to the said 2000, with intent to defraud the prosecutor. The twentieth count was in the future tense, and treated the Company as one *to be* formed, and the shares as *to be* fabricated. The twenty-first count charged the defendants with conspiring by false pretences, (without stating them), to get into their possession certain money of the prosecutor.

If persons conspire to fabricate shares in addition to the limited number of which a joint stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the Company.

From the evidence it appeared, that the Company had not been legally established; and that the papers which the defendants were charged with conspiring to fabricate, were scrip receipts given by the bankers of the Company, to the holders of certain letters, in return for the payment of deposits.

Whether scrip receipts given by the bankers of such a Company in return for sums paid as deposits, can be properly described as *shares* in the indictment.—*Quære.*

Scarlett on the part of the defence.—The indictment supposes a Company legally formed, and *shares* legally issued, and every count calls them shares, not *intended shares*, or *scrip receipts*.

ABBOTT, C. J.—I am not prepared to say, that although the Company might not be well constituted, yet that a fraud committed in connection with it might not be punished by prosecution.

Scarlett.—But I submit that there were no *shares*.

1827.
REX
v.
MOTT.

Denman, C. S., for the prosecution.—I rely on the twentieth count, which states, that a certain Company *had been* proposed and projected. And as to the scrip receipts being called *shares*, the parties all along treated them as shares; and in a case of fraud that is sufficient.

Starkie on the same side.—There is a count charging the conspiracy to be by false pretences without using the word shares. The letters and the scrip receipts are only evidence of the false pretence. If it was intended that the parties, by means of letters and scrip receipts, should have shares, that will be sufficient. The gist of the offence is the conspiracy, and that is ultimately to create a number of shares; therefore the fabrication of shares need not be proved.

ABBOTT, C. J.—I think I ought not to stop the prosecution on this objection: but, speaking as a lawyer, I should say, that these receipts had not become *shares*, but were only things which might *be made shares*.

Other witnesses were then examined, from whose evidence it appeared that the receipts which the prosecutor was to have, were not in addition to, but part of the 2000.

ABBOTT, C. J.. in summing up to the Jury, (*inter alia*), observed.—One part of this indictment charges the defendants with conspiring to make more shares, in addition to the 2000; and if, in point of fact, a combination to that effect were made out, I should say, as at present advised, that, in point of law, such conduct constituted an offence punishable in a criminal way, notwithstanding the original imperfection of the Company's formation.

The facts were then left to the Jury, who found the defendants

Not Guilty.

Denman, C. S., and *Starkie*, for the prosecution.

Scarlett, *Adolphus*, *F. Pollock* and *Brougham*, for defendant Ireland.

Gurney, and *Campbell*, for defendant Stainsby.

Holt and *E. Quin*, for defendant Mott.

[Attornies—*Bicknell & Co.*, and *Green & A.*]

1826.
Rex
v.
Mott.

WIDGER v. BROWNING.

Jan. 15th.

TROVER for goods, which had belonged to the plaintiff, and were taken by the defendant as assignee, under a commission of bankrupt, dated June 19th, 1823, which had been issued against the plaintiff. The present action was brought to try the validity of that commission.

If notice of disputing an act of bankruptcy be served on the clerk of the assignee, at his counting house, that is a good service of it.

Notice of disputing the act of bankruptcy had been left with a clerk of the defendant at his counting house, before issue joined.

Wilde, Serjt., for the defendant.—I submit that this is not a good service of the notice. It was held in the case of *Howard v. Ramsbottom* (a), that the service must be personal; and if the service of the notice is insufficient, it will not be necessary to give any evidence of the act of bankruptcy, since the stat. 6 Geo. 4, c. 16 (b).

(a) 5 Taunt. 524. In this case the Court said, that leaving a notice of intention to dispute the act of bankruptcy with the maid-servant of the assignee, was not a good service of it, but that a service on the attorney of the assignee was sufficient. That case was on the stat. 49 Geo. 3, c. 191, (now repealed), but the wording of the

stat. 6 Geo. 4, c. 16, s. 90, is not materially different on this point.

(b) By which it is enacted, (s. 90) "That in any action by or against any assignee, or in any action against any commissioner or person acting under the warrant of the commissioners for any thing done as such commissioner, or under such warrant, no proof shall be

1827.
 WIDGER
 v.
 BROWNING.

Scarlett, contra.—It is a general rule, that personal service is only necessary where it is to bring the party into contempt, or where it is to be the foundation of a criminal proceeding.

ABBOTT, C. J.—I think that the service in the present case is sufficient.

Parol evidence was then given of an act of bankruptcy; and the plaintiff was

Nonsuited.

Scarlett and Campbell, for the plaintiff.

Wilde, Serjt., *F. Pollack* and *Perring*, for the defendant.

[Attornies—*Orchard*, and *Fyson & B.*]

required at the trial of the petitioning creditor's debt or debts, or of the trading or act or acts of bankruptcy, respectively, unless the other party in such action shall, if defendant, at or before pleading, and if plaintiff, before issue joined, give notice in writing to such assignee, commissioner, or other person, that he intends to dispute some, and which of such matters; and in case such notice shall have been given, if such assignee, commissioner, or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom

the cause shall be tried, may (if he thinks fit) grant a certificate of such proof or admission, and such assignee, commissioner, or other person shall be entitled to the costs to be taxed by the proper officer, occasioned by such notice, and such costs shall, if such assignee, commissioner, or other person, shall obtain a verdict, be added to the costs, and, if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignee, commissioner, or other person."

1827.

Jan. 17th.

TAYLOR v. BRIGGS and Another.

ASSUMPSIT on a charter party. The whole question was as to the meaning of the words "*Cotton in bales.*"

For the plaintiff, it appeared, that the cotton in question was to be brought from Alexandria to Liverpool; and it was proved, that if a quantity of cotton be put simply into a bag, it is called a bag of cotton; but that if after that it be compressed into a cubical form, so as to take less room, it is then called a bale.

For the defence, it was proved, that although what had been stated by the plaintiff's witnesses was correct as to cotton brought from Calcutta, yet that the trade in cotton between Liverpool and Alexandria being only of three or four years' standing, there are no means of pressing the bags there; and in consequence the terms bag and bale are used indiscriminately, as meaning the unpressed bag of cotton: and in further proof of this, the bill of lading was put in, which stated the cargo to be 1400 *bales* of cotton, although they were in fact unpressed. And the broker through whom the charter party was entered into, gave evidence of what was said at that time.

ABBOTT, C. J.—The important point here is as to the meaning of the word bale, one party contending that it means a compressed bale; the other party, that it means a bag. If the word bale had acquired a particular meaning in regard to the trade of Liverpool and Alexandria, I should consider that that meaning should apply in this case; but there should be distinct evidence that the word has that particular meaning. With regard to the Surat bales, it is quite clear that they are compressed. The broker has given evidence of something that was said at the time; but I think that if there be a written instrument signed by the parties, and a particular construction of it will much benefit one party and injure the other, that sort of evidence is of too dangerous a nature to be re-

If a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but, that the word has acquired that particular meaning must be distinctly proved.

If one construction of a charter party be much in favour of one of the parties, and an opposite construction equally in favour of the other, the evidence of the broker through whom it is entered into, as to what was said at the time of its execution, is of too dangerous a nature to be much relied on.

1827.
 TAYLOR
 v.
 BRIGGS.

lied on; and the question I shall leave to the Jury is — what was meant by the term bale?

The Jury, which was special, found, that a bale means a compressed bale.

Scarlett, Marryatt, and Campbell, for the plaintiff.

Tindal, S. G., and *F. Pollock*, for the defendants.

[Attornies—*G. Smith*, and *Oliverston*.]

IN the ensuing Hilary Term, *Tindal*, S. G., obtained a rule *nisi* for a new trial, on payment of costs, for the purpose of adducing further evidence; but that rule was afterwards discharged.

See the case of *Wood*, Assignee of *Hall*, v. *Wood*, *ante*, Vol. 1, p. 59.

COURT OF COMMON PLEAS.

Adjourned Sittings at Westminster, after Michaelmas Term, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

1826.
 Dec. 1st.

LINDSAY v. LIMBERT.

An assignee of a lease under the Insolvent Debtor's Act, is entitled to a reasonable time in which to decide whether he will accept the lease or not, and during that time he may take such steps as he may think necessary for the purpose of trying to render the property productive.

COVENANT for rent.—The declaration stated a lease from the plaintiff to a person named Biddle, dated the 23d of September, 1823; and then alleged, that after the making of the said lease, and during the term thereby granted, to wit, on the 19th of December, 1825, all the estate, &c. of Biddle in the premises demised, with the appurtenances, by assignment thereof then and there legally made, came to and vested in the defendant: whereupon and whereby the said defendant then and there entered into and upon all and singular the said demised premises, and became and was possessed thereof, and con-

tinued so thereof possessed from thence until and at and after the time the rent thereafter mentioned became due and payable, &c.

1826.
LINDSAY
v.
LIMBERT.

The plea was, that the estate, &c. of Biddle, in the said demised premises in the declaration mentioned, by assignment thereof legally made, did not come to and vest in the defendant in manner and form as the said plaintiff had in his declaration alleged.

The defendant was the assignee, under the Insolvent Debtor's Act, of Biddle the lessee. The assignment to him under the act was made on the 19th of December, but the defendant did not totally abandon his connection with the lease and premises till the 17th of May following; and in the interval he tried to let the premises, but was not successful. There was contradictory evidence as to whether he had accepted the lease in an unqualified or merely a conditional manner.

Wilde, Serjt., for the defendant, cited the case of *Copeland v. Stevens* (a), and contended that under the stat. 1 Geo. 4, c. 119, an assignee was entitled to a reasonable time for the purpose of considering whether he would accept of the lease.

Taddy, Serjt., for the plaintiff, contended that the only question was one of possession, which was admitted by the defendant's plea, inasmuch as that plea only negatived the assignment and not the possession. He cited *Croft v. Peck* (b).

(a) 1 B. & A. 593.—The Court there decided that “the general assignment of a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards the term, and their acceptance of the

estate, rents, &c.; and therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy.”

(b) 8 Moore, 384.—In that case it was held that the provisional assignee of the Insolvent Court, being

1826.
 LINDSAY
 v.
 LIMBERT.

BEST, C. J. left it to the Jury to say, *First*, whether the defendant had or had not accepted the lease conditionally, in order that he might see if he could turn it to any advantage; and *Secondly*, if he had so done, whether the time he had kept it was a reasonable time, for the purpose of seeing what he could do with it.

The Jury found for the defendant, establishing the conditional acceptance, and the reasonableness of the time. Leave was given to the plaintiff to move to enter a verdict.

Taddy, Serjt., and *D. Pollock*, for the plaintiff.

Wilde, Serjt., and *Comyn*, for the defendant.

[Attornies—*Spike*, and *H. H. Duncombe*.]

In the ensuing Hilary Term, *Taddy*, Serjt., moved, pursuant to the leave given. In addition to the cases cited at the trial, the case of *Turner v. Richardson* (a) was mentioned.

The Court said, that the case of *Croft v. Peck* was not in point, as it was decided on the ground that the provisional assignee, being the public officer of the court, had no discretion; and that *Turner v. Richardson* was precisely in point.

a public officer, must, by the mere fact of the assignment to him, be taken to have accepted all the interest the insolvent had in his property so assigned.
 (a) 7 East, 335.

Dec. 2d.

HUBERT, Gent., one, &c. v. MOREAU.

A person, after he became bankrupt, and before he had got his certi-

cate, called at the office of his attorney to whom he was indebted, and wrote there, the attorney not being at home, a letter promising to pay him a sum of 100*l*. The only signature was a flourish of the pen, which it was contended by the plaintiff formed the letter M., the initial letter of the defendant's name: Held, that if it was an M., it was not a sufficient signature under the statute, 6 Geo. 4, c. 16, s. 131. *Scumble*—that if such a letter be without date, the time when it was written cannot be proved by parol evidence.

ASSUMPSIT for work and labour. Pleas—First, *non assumpsit*; and second, that the defendant became bank-

rupt on the 4th of July, 1826. The plaintiff was an attorney, and the defendant a Frenchman, named *Pierre Armand le Comte de Fontaine Moreau*. It appeared that the defendant, being indebted to the plaintiff for business done, called at his office, and wrote a letter in French, which he left for the plaintiff, he not being at home. The letter requested the plaintiff not to be angry at the defendant's not bringing him any money, mentioned an expectation of getting some by an arbitration which was then in progress, and concluded with a passage, of which the following is a translation: "*I can, however, assure you for certain, that before the 15th of next month, I shall be able to let you have 100l.*" This letter was not dated, and the question of fact in the cause was, at what time it was written; it being contended on the part of the plaintiff that it was written on the 23d of August: and on the part of the defendant, that it was written on the 31st of May. In the first case it would be after, and in the second before the defendant's bankruptcy.

For the purpose of shewing that it was written on the 23d of August, a clerk of the plaintiff's was called, who stated that he was present on that day while the defendant was writing it.

Wilde, Serjt., for the defendant, objected to this mode of supplying the date by parol. By the 6 Geo. 4, c. 16, s. 131 (a), it is provided, that a bankrupt shall not be liable upon any promise to pay a debt discharged by his certificate, unless such promise be in writing. The ques-

1826.
 HUBERT
 v.
 MORREAU.

(a) The section is as follows:—
 "And be it enacted, that no bankrupt after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt,

claim or demand, upon any contract, promise or agreement made, or to be made after the suing out of the commission, unless such promise, contract or agreement be made in writing, signed by the bankrupt, or by some person there-to lawfully authorised in writing by such bankrupt."

1826.
 HUBERT
 v.
 MORREAU.

tion as to when the letter was written is the material fact in the cause, and that fact is sought to be proved by parol, in the very teeth of a statute which guards so carefully against proving the promise by parol. If such evidence is allowed, it will open a door to fraud, by giving a party in possession of a letter written before a bankruptcy, the opportunity of insisting that it was written after.

BEST, C. J.—The strong inclination of my opinion is, that this is a good objection; but I will not decide it here; but let the cause go on, and leave it for the decision of the Court.

The letter had no name attached to it, but something that looked like an M.; and *Wilde*, Serjt., contended that it could not be said to be signed as required by the statute. It was handed to

BEST, C. J., who, upon looking at it, observed—It may be an M., or it may be a waving line: but if it be an M., I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject; but for the sake of the character of the parties I will allow the cause to go on.

Taddy, Serjt.—Perhaps your Lordship will allow us to produce evidence to shew, that the defendant usually signed in that way.

BEST, C. J.—No, I will not.

Wilde, Serjt., then further objected, that the promise contemplated by the statute, was one to be made after a man had obtained his certificate, and not before, when he was not discharged from his legal liabilities (a).

(a) He also objected, that the promise to pay the original debt in the letter was not a promise which alone would support the

BEST, C. J.—I think that as the statute is penned, any promise having the requisites of the act made after the bankruptcy, will not be discharged by the certificate.

1826.
HUBERT
v.
MOREAU.

A Frenchman, who was called as a witness, stated, on being shewn the letter, that in his opinion the mark which was taken to be an M., was nothing but a flourish.

Upon this BEST, C. J., said, that he would nonsuit the plaintiff; but that, for the sake of the character of the parties, he would take the opinion of the Jury upon the question of fact, as to when the letter was written.

This question was accordingly submitted to them, and the Jury found that the letter was written on the 23d of August.

Nonsuit, with leave to move.

Vaughan and *Taddy*, Serjts., and *Abraham*, for the plaintiff.

Wilde, Serjt., and *Justice*, for the defendant.

[Attornies—*Hubert*, and *Fisher & S.*]

IN the ensuing Hilary Term, *Vaughan*, Serjt., moved, pursuant to the leave given.—He cited the case of *Schneider v. Norris* (a), and contended that the M. was a sufficient signing within the act, it being the sign used by the party, to denote that the instrument was his.

The Court refused a rule.

action, but a special promise to pay 100*l.* on the 15th of the next month: but upon this objection no decision was given.

(a) 2 M. & S. 286. In that case a bill of parcels, in which the name

of the vendor was printed, and that of the vendee written by the vendor, was held to be a sufficient memorandum of the contract, within the statute of frauds.

1826.

Adjourned Sittings in London, after Michaelmas Term, 1826.

Dec. 11th.

PROCTOR v. JONES.

The marking, by the vendor, of casks of wine lying in the docks with the initials of the purchaser, at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the statute of frauds.

ASSUMPSIT to recover the price of a quantity of wine. The plaintiff's clerk proved that he went with the plaintiff and defendant to the London Docks, for the purpose of the defendant's tasting some wine of the plaintiff's. After several sorts had been tasted, and the prices mentioned, the defendant agreed to take two casks of Port, and directed the witness to mark them with the initials of his name, that no mistake might occur. On being asked his initials by the plaintiff, he said they were T. J.; and T. J. was then marked on the casks by the witness in the defendant's presence: a third was afterwards marked in the same way. The plaintiff then left; and the witness and the defendant went towards another warehouse to see some Cape wine; and while they were going, the defendant said, that he had laid out a good deal of money in gin, and should want some time for the wine. The witness told him he might have two months, and he said that would do very well. The defendant then said that he had several cases in the Court of Requests, and he must go there, or he should be nonsuited, but added, that the witness knew what would suit him; and he left it to him to select for him both with regard to the quality and price.

For the plaintiff, the case of *Anderson v. Scott* (a), was cited.

(a) 1 Camp. N. P. C. 235 n. That case was special *assumpsit* for the non-delivery of wines; and Lord *Ellenborough* held, that the cutting off the pegs by which the wine was tasted, and the marking

of the plaintiff's initials on the casks by the defendant's agent, in the presence of all the parties, amounted to a delivery under the statute of frauds.

Wilde, Serjt., for the defendant. — An act done by the vendor, is not an act which will bind the purchaser under the statute of frauds. There was no contract at the time of marking; the contract was made afterwards: marking is not sufficient. *Anderson v. Scott* has been considered a very strong case. The words of the statute (a) are, that “no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling, or upwards, shall be good, except the buyer shall accept part of the goods so sold, and *actually receive the same*, or give something in earnest to bind the bargain, &c.” It does not appear in what condition the wines were at the Docks, to what order they were deliverable, or to what liens they were subject. What occurred cannot be said to be equivalent to an actual receipt, when it does not appear that the purchaser had any control over the wine.

1826.
 PROCTOR
 v.
 JONES.

Hutchinson, on the same side, referred to the cases of *Farebrother v. Simmons* (b), *Baldey* and *Another v. Parker* (c), and *Thomson v. Maceroni* (d).

(a) 29 Car. 2, c. 3, s. 17.

(b) 5 B. & A. 333. The point decided in that case is, that the agent contemplated by the 17th section of the statute of frauds, who is to bind a defendant by his signature, must be a third person, and not the other contracting party; and therefore, if an auctioneer write down the defendant's name, by his authority, opposite to the lot purchased, such entry is not sufficient, in an action brought in the name of the auctioneer, to take the case out of the statute.

(c) 2 B. & C. 37. *Assumpsit* for goods sold. The plaintiffs were linen-drappers; and the defendant came to their shop and bargained for various articles. A separate price was agreed on for each, and no one article was worth 10*l.* The

defendant marked some with a pencil, helped to cut others from the bulk, and some were measured in his presence. A bill of parcels was, at his desire, sent with the goods; he refused to accept them. It was decided that there was but one contract for the whole, and that there was no delivery and acceptance of any part of the goods, and therefore that the case was within the statute of frauds. S. C. 3 D. & R. 220.

(d) 3 B. & C. 1. In this case, goods of the value of 144*l.* were made to order, and remained in the possession of the vendor, at the request of the vendee, with the exception of a small part, which the vendee took away; and it was held, that there was no acceptance of the residue of the

1826.
 PROCTOR
 v.
 JONES.

Vaughan, Serjt., in reply, contended, that the proposition was a monstrous one, which was sought to be maintained on the part of the defendant. He cited *Elmore v. Stone (a)*.

BEST, C. J.—That case has been overruled.

Vaughan, Serjt.—Could the plaintiff have had a right, if he had heard of the insolvency of the vendee, to say there was no delivery? There was a symbolical delivery.

Manning, on the same side.—The case of *Baldev v. Parker* is distinguishable from this, because there the goods were capable of delivery; but here they were not, partly on account of their bulk, and partly on account of the necessity of previously paying the duty.

BEST, C. J.—The statute of frauds and the statute of limitations were both so much objected to at the time when they were passed, that the judges appeared anxious to get them off the statute-book; but in later times they have become desirous to give them their full effect. I think the statute of frauds is a good and wholesome statute. In other countries, contracts are made in writing. If my Lord *Ellenborough's* opinion in the case of *Scott v. Anderson* was an opinion upon a matter of common law, I should act upon it; but it is on the construction of a statute; and the words of the statute are against it. It is the intention of the statute, that there should be as complete a delivery as can be according to the nature of the article. It cannot be said in the present case, that the defendant *actually received* the goods. Could the vendee

goods within the statute of frauds.
S. C. 4 D. & R. 619.

(a) 1 Taunt. 458. The point there decided is, that “if a man bargains for the purchase of goods, and desires the vendor to keep

them in his possession for an especial purpose for the vendee, and the vendor accepts the order, this is a sufficient delivery of the goods within the statute of frauds.”

maintain trover if the goods were not delivered?—Certainly he could not, for the seller would have a lien on them for the price, as there was no stipulation as to payment at a future time. But not only was there no delivery, but there was no complete contract at the time of the marking; for at that time the time of payment was not agreed upon; but it was settled in a conversation afterwards. If there was no complete contract at the time of the marking, then the marking cannot be an acceptance under the statute. If the plaintiff had made a transfer in the Dock books, that would, in my opinion, have been a symbolical delivery. I think, looking to the words of the statute, that I am bound to call the plaintiff.

1826.
PROCTOR
v.
JONES.

Nonsuit.

Vaughan, Serjt., and *Manning*, for the plaintiff.

Wilde, Serjt., and *Hutchinson*, for the defendant.

[Attornies—*Boxer*, and *Harmer*.]

RUTHVEN v. BROWN, Esq.

Dec. 13th.

THE declaration stated, that the plaintiff, in Easter term, 5 Geo. 4, recovered against James Haselden, 231*l.*, as his damages, as by the record and proceedings thereof more fully appeared; and that on the 2th day of November, in Michaelmas Term, 1824, the said James Haselden, then being in the custody of the defendant, as Warden of the Fleet Prison, was brought to the bar of the Court of Common Pleas, and re-committed thence in execution. It then alleged a further bringing up and a remand on the 24th January, 1825, and then went on to state, that afterwards, to wit, on the 10th day of June, 1825, the

A prisoner in the Fleet Prison had obtained a day-rule in the usual form, permitting him to go abroad to transact his affairs and advise with his counsel, and to return the same day. He went to Sadler's Wells theatre, where he was seen as late as half past 11 in the evening:—

returned within the ambit of the prison before 12 at night, the Warden could not be liable in an action for an escape, notwithstanding the abuse and misapplication of the rule.

Held, that if he

1826.
 RUTHVEN
 v.
 BROWN.

defendant permitted Haselden to escape from his custody, the plaintiff being then unsatisfied of his damages, by reason of which an action accrued to the plaintiff to demand and have from the defendant the said sum of 231*l*. The pleas were *nil debet*, and several special pleas of justification; one of which was, that on the said 10th of June, 1825, a certain rule or order was made by the Court of Common Pleas, whereby it was ordered, that the said James Haselden should have leave to go abroad that day out of the said prison of the Fleet, to transact his affairs, and advise with his counsel, and to return to the same prison *the same day*, according to the form of the statute in such case made and provided. The plea then alleged that the said James Haselden did return to the said prison, and into the custody of the defendant, as Warden, on that day, *pursuant to the rule*. To this the plaintiff replied, that the said James Haselden *did not return* to the said prison, and into the custody, &c. pursuant to the said rule, in manner and form as alleged in the plea. This replication concluded to the country; and issue was joined upon it.

An examined copy of the record of the judgment in the cause of *Ruthven v. Haselden* was produced, from which it appeared that it was of Michaelmas Term.

The defendant's counsel objected, that, as the declaration stated, that the judgment was recovered in Easter Term, there was a variance.

The plaintiff's counsel, in answer to the objection, cited the cases of *Purcel v. M'Namara* (a), and *Stoddart v. Palmer* (b).

(a) 9 East, 157.

(b) 3 B. & C. 2, and 4 D. & R. 624. Action for a false return to a *fiery facias*. The declaration stated, that the plaintiff in *Trinity Term*, 2 Geo. 4, by the judgment

recovered, &c., concluding with the words, "as appears by the record." The proof was of a judgment in *Easter Term*, 3 Geo. 4. It was held that this was no variance, for that the averment, "as ap-

BEST, C. J.—Upon the authority of *Stoddart v. Palmer*, I am of opinion, that it is no variance.

1826.
RUTHVEN
v.
BROWN.

Proof of the remand and commitment of Haselden under the writ of *Habeas Corpus*, was then given.

An order of Mr. Justice *Park* made on the 14th of November, 1825, requiring the plaintiff to furnish a particular in writing, of the days and times on which he meant to insist that Haselden escaped, and also an order of the same learned Judge confining him to the 28th of November, 1824, the 30th of January, 1825, and the 10th of June 1825, being the three times mentioned in the particular.

A witness was called, who proved, that on the evening of the 10th of June, 1825, he saw Haselden at Sadler's Wells Theatre, which place they left at the same time, *viz.* between a quarter and half past 11 at night.

On the 11th of January, 1825, a written notice was served on the defendant, signed by the plaintiff's then attorneys, stating that Haselden had been seen at Kensington, and threatening an action if the defendant did not lock him up.

A witness was also called, who stated, that on the 7th of March, 1825, he accompanied the plaintiff to the defendant's, and had an interview with him: the plaintiff said, that he was come to give notice that Haselden had again been seen out of the rules; that he had been seen in Surry by a Mr. Pearson, who would tell the defendant when it was, if he would call upon him. The plaintiff also desired that the defendant would bring Haselden within the walls. The defendant said, that he should not call on Pearson, but if Pearson would call on him, he would hear what he had to say; and that he should not deprive Haselden of the rules, as he had given security and had paid for them.

pears by the record," was surplusage, and might be rejected, inasmuch as the judgment was not the

foundation of, but mere inducement to, the action."

1826.
 RUTHVEN
 v.
 BROWN.

The plaintiff said, that he should proceed against the defendant if Haselden was again seen out of the rules. The defendant said he might do as he pleased, for he was well secured, and should not bring him within the walls.

Haselden had been discharged out of custody by a Judge's order, on payment of the debt, but without prejudice to the plaintiff's action.

For the defendant, the day-rule, of the 10th *June*, was put in, (an objection that it was admitted by the terms of the replication having been overruled). It was in the usual form.

Witnesses were then called to shew that Haselden was at his lodgings within the rules before 12 at night on that day, but their testimony was materially shaken on their cross-examination.

Vaughan, Serjt., for the defendant.—It has been decided that a day rule operates for the entire day. The most liberal and ample construction has been put upon the permission of the Court. *Field v. Jones (a)*. When Haselden was coming from Sadler's Wells, he was under the protection of the law, and had a right to go where he pleased. There was no escape.

Bosanquet, Serjt., for the plaintiff.—The object of a day rule is, that a man may transact his business, and advise with his counsel; these are the terms of the order: but a man is not allowed to be out till past 11 at night, and to amuse himself by going to theatres. The business of the Courts is over long before that hour. Though the witnesses should be believed, who swear that Haselden was at home before twelve, yet as he was not out for the purposes

(a) 9 East, 151. This case decides that a day rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of

the prison before the sitting of the Court on the same day, though the marshal were sued for that escape, which occurred before the sitting of the Court.

mentioned in the rule, that is no justification. The plea says, he returned *in pursuance of the rule*; but we deny that in our replication. There is a rule of the Court of King's Bench, of the 30th Geo. 3, mentioned in 3 T. R. 584, that every prisoner of that Court having a day-rule, shall return within the walls or the rules at or before 9 o'clock at night; that is the reasonable and proper time, and I apprehend that my Lord Chief Justice will consider that rule as affording a reasonable construction of the law upon the subject, and apply such construction to the day-rules of the Court of Common Pleas. With respect to the case cited of *Field v. Jones*, it has nothing to do with this point.

1826.
 RUTHVEN
 v.
 BROWN

BEST, C. J.—As to the law upon the subject, I am of opinion that the Warden is not answerable for the abuse of the order of the Court. Haselden obtained the day-rule by fraud. It was not obtained for the purposes of business, but to enable him to pursue, at the expense of his creditors, amusements which, in him, were highly criminal. But that arose from a defect in the rule of our Court. The Warden was bound to obey that rule, and is not answerable for any misuse of it by the party obtaining it, provided such party returned within the ambit of the prison before twelve at night. I cannot take the rule of the King's Bench as an exposition of the general law, but as itself creating a new law; and therefore I think the only question is, did this man return within the rules before 12 at night on the 10th of June. We can improve upon the rule of the King's Bench, and make an order not only that a party shall return at 9 o'clock, but also that he shall not be at liberty to go to public places of amusement. But unfortunately, at present, we have no such rule. There is a case in the King's Bench (a), which decides that going beyond the rules is not an escape. But if the Warden, after notice that a man has been abusing his privilege, by going beyond the rules, does not think it right to lock that man

(a) *Bonafous v. Walker*, 2 T. R. 136.

1826.
 RUTHVEN
 v.
 BROWN.

up, I, for one, shall require a very long argument to convince me, that it is not a negligent or voluntary escape. And I am of opinion, that if such notice be given, it is the duty of the Warden to make enquiry into it, for if the information is true, he will be liable. His Lordship then left it to the Jury to say, whether, in fact, Haselden returned before 12 at night, telling them, that if they thought he did not, they must find a verdict for the plaintiff; but with nominal damages only, as the original debt and costs had been paid.

The Jury found for the plaintiff.

Bosanquet and Taddy, Serjts., and *Perring*, for the plaintiff.

Vaughan, Lawes, and Wilde, Serjts., for the defendant.

[Attornies—*E. Isaacs*, and *Pullen*.]

THIS decision was confirmed by the Court, in the following Term; and a rule was subsequently made requiring all persons to whom day rules should be granted to return within the rules by nine o'clock in the evening.

Adjourned Sittings at London, after Michaelmas Term, 1826.

BEFORE LORD CHIEF JUSTICE BEST.

Dec. 15th.

GRESHAM v. POSTAN.

In an action on the case for a breach of an express warranty, that a horse was quiet; if the declaration allege that the de-

fendant well knew him to be unquiet, this is an unnecessary averment, and need not be proved.

CASE for falsely warranting a horse to be quiet in harness.—In the declaration it was averred, that the defendant well *knew* the horse to be unquiet in harness. No evidence was given of the *scienter*.

Wilde, Serjt., for the defendant, contended, that although it might be unnecessary to aver this in the declaration; yet as it was so averred, the plaintiff could not recover without its being proved.

1826.
GRESHAM
v.
POSTAN.

Vaughan, Serjt., and *Kelly*, *contra*.—It is clearly an unnecessary and superfluous averment. If it was not, the declaration would never be perfect without it; and if we prove all the averments that are necessary to support our action that is enough, and we are entitled to recover.

BEST, C. J.—It is certainly unnecessary to allege that the defendant knew the horse to be unquiet; and it being unnecessary to allege it, it need not be proved.

Verdict for the plaintiff.

Vaughan, Serjt., and *Kelly*, for the plaintiff.

Wilde, Serjt., and *Moody*, for the defendant.

[Attornies—*Gresham*, and *Scarth*.]

For the usual form of declaring in case on an express warranty, see 2 Chitt. Plead. 316; and see *Horncastle v. Moat*, ante, Vol. 1, p. 166.

BUSZARD and Others, Assignees of JONES and Another,
Bankrupts, v. CAPEL.

Dec. 16th.

TROVER for two barges named Spring and Autumn, which had been taken under a distress for rent by the defendant, who was the receiver appointed by the Court of Chancery, of the profits of the estate of the party under whom the bankrupts held Davis's wharf, in Lower Thames Street.

The barges, at the time when they were taken, were lying in the river, underneath the wharf, and fastened by

Barges lying in a river close to a wharf, and fastened to piles, intended partly for the support of the wharf, and partly that barges may be attached to them, may be distrained for rent due in respect of the wharf, they be-

ing as much on the premises demised as the nature of the thing will admit of.

1826.
BUSZARD
v.
CAPEL.

ropes to piles driven down close by the side of the brick-work, partly for the support or protection of a granary which was on the wharf, and partly for the purpose of having barges attached to them. There was no space between the edge of the water and the granary, so that a person might step out of the building at once into the barges.

Vaughan, Serjt., for the plaintiffs, contended that the barges ought not to have been taken, as they could not be said to be on the premises.

BEST, C. J.—I shall tell the Jury, that if the piles are constantly used, they form a part of the demised premises. The liberty of attaching barges to them is one of the conveniences and advantages of the wharf.

The lease granted to the bankrupts was then read. It described the property as a wharf ground and premises next to the river Thames, and a brick built warehouse, and contained the words “together with all easements, profits, commodities,” &c.

BEST, C. J.—If there had been nothing in the deed but the word wharf, I should have thought that description sufficient; for the barges were as much attached as the nature of the thing would admit.

Vaughan, Serjt.—The river is a public river, and the party has no interest in the soil.

BEST, C. J.—That makes no difference. As the piles are fastened to the building partly for its support and partly for the purpose of attaching barges to them, the barges must be taken as being on the demised premises.

Vaughan, Serjt., then endeavoured to establish a case of fraudulent preference. He called the bankrupt's clerk, who proved that he saw the barges in the stream, about

the middle of the day before the distress. That the barges were not wanted for the purpose of being used in the business on the day of the distress, and that he did not remember their being brought along side the wharf on any occasion before, when they were not wanted. He added, that he could not swear that either of the barges had been used for a week before the distress.

It was also proved, by the examination, under the commission, of one of the defendants, who was the broker, that on the evening before he told one of the bankrupts that he should come down the next morning and distrain, upon which the bankrupt said that he knew that rent was due, and expected a distress.

BEST, C. J.—You see the difficulties which you have in this case. You will be met by proof that the barges were legally distrained.

Vaughan, Serjt.—But fraud may always be inferred from circumstances.

BEST, C. J.—Do you think you can persuade a Jury to infer it from such circumstances as these? Why don't you call the bankrupt?

Vaughan, Serjt.—He has not received his certificate.

BEST, C. J.—You can call him if the other side do not object.

Wilde, Serjt.—This action is defended under an order of the Court of Chancery; and I would appeal to your Lordship to know, whether I have authority, in such a case, to waive any objection.

BEST, C. J.—I should think the Court of Chancery would be the first to wish all the facts to be discovered. I cannot give advice on the subject; but I will say to the

1826.
BUSZARD
v.
CAPEL.

1826.
 BUSZARD.
 v.
 CAPPEL.

Court of Chancery, that it was my opinion that the bankrupt ought to be called.

Wilde, Serjt.—We do not take by this delivery of the bankrupts, but by the act of the law.

BEST, C. J., to *Vaughan, Serjt.*—This is a most singular case; but I think you must first shew that the barges were brought within the ambit of the premises by fraud, and when you have done that, I will give you my opinion upon the law.

A witness was then called for the purpose of making out that fact, but not being able to do so the plaintiffs were

Nonsuited.

Vaughan, Serjt., for the plaintiffs.

Wilde and Adams, Serjts., for the defendants.

[Attornies—*Van Sandau & T.*, and *King.*]

IN the ensuing Term the Court granted a rule nisi for a new trial, which was afterwards discharged.

Dec. 16th.

SMITH v. SPARLOW and Another.

A broker having a general authority to purchase spices for one person, having purchased some for that person on a Saturday,

ASSUMPSIT on a contract for the purchase of a quantity of nutmegs.

For the plaintiff, James Smith was called, who was his brother, and carried on business as a broker in the firm of
 went to another person on the Sunday and offered them to him for sale, saying that he would deliver the contract on the Monday. The person to whom they were offered said, that he must have the contract on that day (the Sunday). A bought note was accordingly delivered to him on the Sunday. The broker could not say when he made out a sold note for the vendor; whether it was within a week or more from the Sunday; but stated that he informed him of the sale on the Monday or Tuesday. The entry in the broker's book was not signed: Held, 1st, That the contract was not sufficient under the statute of frauds; and secondly, That supposing it were so, yet that it would be void on account of its having been made on a Sunday.

Smith & Williams. From his evidence it appeared, that the plaintiff, who lived at Chigwell, and had retired from business, generally had funds in the hands of Smith & Williams, and gave them a general authority to purchase spice for him. That on Saturday the 26th of February, 1825, they purchased for him a quantity of nutmegs, of a broker named Albrecht. That Smith & Williams also did business for the defendants F. and R. Sparrow, who were tea dealers and grocers. That on the morning of Sunday the 27th, James Smith, the witness, whose residence was at Stockwell, near to F. Sparrow's, called upon him and asked him if he would like to do any thing in spices, and mentioned to him the nutmegs he had bought on the Saturday, and offered them at 11s. 6d. a pound. Sparrow said he would take them at 11s. 3d. Smith said that he could not give an answer till he had been to town, and added, that he would deliver the contract on the Monday, with that for some mace, which Sparrow had ordered. Sparrow said he must have the contract that day, as he was going down to the country to get somebody to join him in the purchase. Smith went to town, and when he returned to Stockwell delivered a contract to Sparrow for the nutmegs, at 11s. 6d. It was then read. It was dated the 26th of February, 1825, and signed Smith & Williams, and commenced as follows:—"Messrs. F. and R. Sparrow. We have this day purchased for you, &c."

There was a note on the face of it in Sparrow's handwriting, "to sell at 12s. 6d." After the contract was delivered, Sparrow said that he would not have the nutmegs sold under 12s. 6d. a pound. The same day he gave Smith directions to buy more, and left him his address at Bristol, where he was going."

The entry of the contract in the broker's book was read. It was "F. and R. Sparrow, bought of Thomas Smith, &c.," dated 26th February. It was not signed. The whole of the entry was made on the Sunday, with the exception of the words Thomas Smith, which were written on the

1826.

SMITH

v.
SPARROW.

1826.
 SMITH
 v.
 SPARROW.

Monday. Smith, the broker, said, that his brother left it to them to do the best they could for him, and that they sent him in a statement every year, with an account of interest. He also said, in answer to questions put by BEST, C. J., that he never told Sparrow that he was selling for his brother. That he could not say when he made out a sold note for his brother, whether it was within a week of the sale or not; but that he informed his brother of what had been done, (both of the purchase and the sale), on the Monday or Tuesday. The sold note made out for the plaintiff was dated the 26th of February, and signed Smith & Williams.

BEST, C. J., observed.—It is material to know when this note was made out; because the question is, whether there must not be two parties to a contract.

Wilde, Serjt.—Under the statute of frauds it is enough that the party to be charged should sign. He cited *Sanderson v. Jackson* (a).

BEST, C. J.—Still it is a question whether both must not be bound to make a contract.

Albrecht, the broker who sold to Smith & Williams, was then called, and stated that he never heard of Thomas Smith as the buyer till several days after the prompt, when Sparrow made a difficulty about the contract; and that he told Smith (the witness) that he did not wish to know the principal, as he looked to him.

Vaughan, Serjt., contended that the broker was within

(a) 2 B & P. 238. The point there decided is as follows:—
 “A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of

the contract within the statute of frauds; at all events, a subsequent letter, written and signed by the vendor, referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute.”

the law against carrying on business on a Sunday. He cited *Fennell v. Ridler* (a).

1826.
SMITH
v.
SPARROW.

Wilde, Serjt., *contra*, cited *Drury v. De Fontaine* (b); and *Bloxsome v. Williams* (c).

BEST, C. J.—There are different decisions upon that point. I think the question has been decided too narrowly. I should have considered that if two parties act so indecently as to carry on their business on a Sunday, if there had been no statute on the subject, neither could recover. Upon this point, therefore, I will give you leave to move to enter a nonsuit, if the verdict should be for the plaintiff. But there is another point: I think there is no contract here; and upon this point I should wish to hear my brother *Wilde*.

Wilde, Serjt.—There was a general authority to buy, and a parol bargain has been proved. The statute leaves the parol contract binding as far as the party *not* sought to be charged is concerned. The paper put in contains all the requisites of a contract, being signed on the part of

(a) 8 Dow. & Ry. 204. The point decided in that case is, that the statute 29 Car. 2, c. 7, for the better observation of the Lord's Day, is not confined to the carrying on of business publicly; and therefore, that a horse dealer cannot maintain an action upon a *private* contract for the sale and warranty of a horse, if made on a Sunday.

(b) 1 Taunt. 131. "A sale of goods, made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor or his agent, is not void at common law, or by the stat. 29 Car. 2, c. 7."

(c) 5 Dow. & Ry. 82. "Where

a parol contract was entered into for the purchase of a horse above the value of 10*l.* on a Sunday, with a warranty of soundness, and the horse was not delivered and paid for until the Tuesday following:—Held, 1st, that the contract was not complete until the latter day; and secondly, that supposing it to be void within the 29 Car. 2, c. 7, still it was not an available objection on the part of the vendor, in an action for the breach of the warranty, the vendee being ignorant of the fact, that the former was exercising his ordinary calling on the Sabbath-day."

1826.
SMITH
v.
SPARROW.

the party to be charged. No doubt, there must be mutuality; but as to one it may be evidenced by parol, though as to the other it must be in writing. It is the constant course, where a letter is produced to prove a contract, not to require proof of any signature on the part of the seller, but only as far as he is concerned to shew a parol bargain made by competent authority.

Spankie, Serjt., on the same side.—There has been a ratification of the contract made, and that gets rid of the objection altogether; and Thomas Smith was clearly chargeable by having given the authority to his broker to buy and sell for him.

BEST, C. J.—I am of opinion that the plaintiff must be called. I remember the words of the statute of frauds, and allow that, generally speaking, no other evidence is required than a writing signed by the party to be charged. But in this case no paper was signed by the agent of the plaintiff; and if he had refused to fulfil his part of the contract the defendant could not have maintained any action against him. To render a contract valid there must be mutuality;—both sides should be bound. Now the contract in this case is not binding on both sides. I ought not to doubt, because I am satisfied that when this law is properly understood many of the evils resulting from the employment of brokers will be remedied. Brokers are in general a most respectable set of men; but I know that brokers have been entrusted with powers which I for one will not consent that they shall have. If a broker is bound to put both names at once, then no fraud can be practised; but if he is to be at liberty to put down my name one day and the other party's another, then it may give rise to many and serious mischiefs; and I hope I shall do some good if my present opinion should be confirmed by the Court. The Courts now require that every thing moving to the consideration should be stated in the contract; and

what is the consideration here? Why it is this: I make a contract with A. B., because A. B. makes a contract with me; and both these contracts ought to be in writing. For these reasons I am of opinion that the plaintiff ought to be called.

1826.
SMITH
v.
SPARROW.

Nonsuit.

Wilde and *Spankie*, Serjts., and *D. Pollock*, for the plaintiff.

Vaughan and *Adams*, Serjts., and *Thesiger*, for the defendants.

[Attornies—*Rixon*, and *D. Willoughby*.]

ON the second day of the ensuing Hilary Term, *Wilde*, Serjt., moved for a new trial on the two points of the sufficiency of the contract, and the effect of the statute 29 Car. 2. On the first point, in addition to the cases cited at the trial, he mentioned *Allen v. Benet* (a), *Schneider v. Norris* (b), and a case in 9 Vesey.

The Court granted a rule to shew cause, which came on to be argued in the course of the same Term.—

(a) 3 Taunt. 169. "An order for goods, written and signed by the seller, in a book of the buyer, but not naming the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller claiming the performance of the order to constitute a complete contract within the statute of frauds. It is no objection to the validity of a con-

tract for the sale of goods, signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it."

(b) 2 M. & S. 286. "A bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor, is a sufficient memorandum of the contract within the statute of frauds, to charge the vendor."

1826.
 SMITH
 v.
 SPARROW.

The Court were of opinion that the decision at *Nisi Prius* was right upon both the points, and therefore they discharged the rule.

Dec. 16th.

GOLDSTONE and Another v. OSBORN, Bart. and Others.

One of the conditions in a policy of insurance against fire, stated that if any difference should arise on any claim, it should be immediately submitted to arbitration, and after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award determining the amount thereof should be duly made.—It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover anything, and did not merely question the amount of damage.

ASSUMPSIT on a policy of insurance, against three of the directors of the County Fire Office. The declaration stated an insurance by the plaintiffs on the 24th of June, 1826, and set out various conditions, one of which was, that if there appeared any false swearing, or *attempt at fraud*, by the claimant, he should forfeit all claim to restitution or payment by virtue of the policy. It then averred, that on the 27th of July, 1826, the articles and things mentioned in the policy, were *accidentally burnt* and destroyed by fire, whereby the plaintiffs sustained a loss to the amount of 936*l.* 6*s.* 3*d.* There were the usual money counts, and the plea was the general issue.

One of the conditions on the policy was, that if any difference should arise on any claim, it should be immediately submitted to arbitration, and such arbitration should be made by one or two persons to be indifferently chosen by the assured, or his legal representative, and by the office, or by such third person as the said arbitrators should appoint, or by any two of them, and no compensation should be payable until after an award determining the amount thereof should be duly made, and the said reference should be subject to such rules and conditions as are usually inserted in orders of reference in the Court of King's Bench, at *Nisi Prius*, in the City of London, and the submission should be made a rule of Court.

Wilde, Serjt., for the defendants, said, that after the account was delivered in, there was some demur; the

plaintiffs proposed to refer, and the defendants consented. But the plaintiffs then refused to refer any thing but the amount. Cases have been determined, upon general clauses of arbitration; but this is not a general clause, and there is no case which applies to it. It is a condition precedent to the right of recovering, that the amount should be ascertained by previous reference.

1826.
GOLDSTONE
v.
OSBORN.

A letter from the plaintiffs' attorney, to the directors of the office, dated 30th August, 1826, was read, offering to refer the plaintiffs' claim to arbitration. To this an answer was sent by the solicitor to the directors, dated the 15th of September, 1826, agreeing to a reference, and suggesting the nomination of six barristers, three by each party, and the selection of an arbitrator out of that number, by ballot. On the 23rd September, the plaintiffs' attorney wrote in reply, that he thought the condition only required a reference as to amount, and did not apply to a case where an objection was made to the right to recover altogether. He added, that the best way would be, to refer under a judge's order, in an action to be commenced. In pursuance of this, he sent a copy of a writ with the form of an agreement of reference.

Vaughan, Serjt., for the plaintiffs, upon this submitted, that their attorney's construction of the condition was right, and that they had proposed to do all that was required of them. He cited *Kill v. Hollester* (a).

BEST, C. J. thought, that, consistently with the decisions, the action was maintainable, and allowed the plaintiffs to proceed.

(a) 1 Wils. 129, B. R., E. 19 G. 2, 1746. Action on a policy of insurance, containing a clause that in case of any loss or dispute about the policy, it should be referred to arbitration. The declaration contained an averment that there had not been any reference. It was objected at the trial, that the action did not lie before a refer-

1826.
 GOLDSTONE
 v.
 OSBORN.

There was another condition which required that all persons insured, sustaining any loss or damage, should forthwith give notice to the head office, and as soon as could be, furnish as perfect an account as they were able, and verify it by oath, or affirmation, and also obtain a certificate under the hands of some reputable householders of the parish, *to the satisfaction of the Association* that they were acquainted with the character and circumstances of the parties claiming, and did know *or verily believe*, that they really, and by misfortune, without any kind of fraud, had sustained by the fire a loss to the amount mentioned in such certificate. And it was provided that until such affidavit and certificate should be produced, the money should not be payable.

For the purpose of shewing a compliance with this condition, a certificate was put in, commencing as follows:—

“ Messrs. Noah Goldstone, and Caspar Marks *having shewn us their account* of the loss sustained by them from the fire at their premises in Old Street, *viz.* on their household furniture, &c. we do verily believe, &c.”

Several of the persons who had signed the certificate, were called and examined as witnesses, and on their cross-examination they said, that they had *not been shewn any account of the loss beyond the statement of it in the certificate itself.*

BRISTOL, C. J. upon this observed.—I think I should be well warranted in directing the plaintiff to be called, but I think it will be better for the interests of the public that the case should be allowed to go on.

ence. The point was reserved, and the Court said, “ If there had been a reference depending, or made and determined, it might have been a bar, but the agreement of the parties cannot oust

this Court; and as no reference has been made, nor is any depending, the action is well brought, and the plaintiff must have judgment.”

A great number of witnesses were called to give evidence of the cause of the fire, the nature of the stock on the premises, and the conduct of the plaintiffs; and

1826.
GOLDSTONE
v.
OSBORN.

BEST, C. J. left it to the Jury to say, *First*, Whether the fire was accidental; and *Secondly*, if it was, whether the plaintiffs had been guilty of, or attempted any fraud.

The Jury were of opinion that there was fraud, and found a verdict for the defendants.

Vaughan and *Taddy*, Serjts., and *E. Lawes*, for the plaintiffs.

Wilde and *Spankie*, Serjts., and *C. Law*, for the defendants.

[Attornies—*C. Wright*, and *Nethersole & B.*]

DANIEL v. BOWLES.

Dec. 18th.

BREACH of promise of marriage. — The mother of the plaintiff proved, that on the 20th of February the defendant was introduced to her at Pisa; and on the 26th of that month he said that he was very much in love with her daughter (the plaintiff). The mother said, that she would mention the subject to her husband, which she accordingly did; and a few days afterwards an interview took place in the drawing-room between herself, the plaintiff, and the defendant. The defendant introduced the subject, and said, that he hoped that there was no objection on the part of the young lady's parents. The witness replied, that there was none; upon which he took her hand,

In an action by a lady for a breach of promise of marriage, it is not necessary, for the purpose of making out the mutual promises, which are necessary to support the action, that the plaintiff by words consented to accept the defendant; but the Jury may infer such consent from the circumstances of her making no

objection at the time of the offer, and her afterwards receiving visits from the defendant in the capacity of a suitor.

1826.
DANIEL
v.
BOWLES.

and said to her, "from this time consider me as your son." It did not appear that the plaintiff made any observation. The witness then said, that as the family were Catholics, she should wish the marriage to take place according to the Catholic ritual. The defendant said he had no objection; and he continued his visits in the capacity of a suitor till the month of April, when he eloped with the plaintiff; and they came together to England. The defendant had a wife living at the time.

Vaughan, Serjt., submitted, that there was not sufficient evidence of a promise to support the action: there ought to be mutual promises; and there was no proof of any promise by the plaintiff, which would enable the defendant to maintain an action against her.

BEST, C. J.—I think that her being present, and not making any objection, coupled with what happened afterwards, shews that she consented, and would be sufficient to enable the defendant to maintain an action against her. It would be indelicate to expect that she should consent in words. No doubt the Jury must be satisfied that there were mutual promises; but I think there is evidence from which they may be inferred.

Verdict for the plaintiff—Damages, 1500*l*.

Wilde, Serjt., and *Merewether*, for the plaintiff.

Vaughan, Serjt., and *C. Phillips*, for the defendant.

[Attornies—*Derby*, and *Garrod*.]

See the note to the case of *Irving v. Greenwood*, Vol. 1, p. 351, of these Reports.

GOODSON v. GOULDSMITH.

1826.

Dec. 20th.

THE declaration stated, that the defendant sold to the plaintiff certain premises, which were held by one Felicia Le Blanc, under an agreement with the defendant, dated in June, 1824, for four years, and by which the said Felicia Le Blanc was bound, among other things, to *leave* the said premises in good tenant-like order and condition, and that the defendant agreed to do all such other tenantable repairs as should not be done by the said Felicia Le Blanc. It then averred that the said Felicia Le Blanc did not leave the premises in the said agreement mentioned, *at the expiration of her tenancy*, in good tenant-like order and condition, but neglected, &c., in consequence of which the defendant was called upon to repair them, and refused, &c. Plea—The general issue.

Three years of Mrs. Le Blanc's tenancy had expired at the time when the plaintiff purchased of the defendant; and the plaintiff immediately made an agreement with her to quit before the expiration of the four years. She did so quit, leaving the premises out of repair; and the plaintiff, by this action, called upon the defendant to put them into a proper state, he having bound himself, by his agreement with the plaintiff, that he would, at the expiration of Mrs. Le Blanc's tenancy, do such repairs as should not have been done by her. The agreement between the defendant and Mrs. Le Blanc was not produced.

Bosanquet, Serjt., and *Rotch*, for the defendant, argued, that it ought to be put in, in order to shew when Mrs. Le Blanc's tenancy expired, and thereby to prove the allegation in the declaration. They also contended, that the defendant had not agreed, and therefore could not be called upon, to perform the repairs earlier than at the expiration of the four years.

A. makes an agreement with B. for the sale of premises, at the time in the possession of C., under an agreement for four years, (three of which have expired), and undertakes to B. that he will do such repairs as are left undone by C. at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair.—*Seemle*, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy, as created by the agreement between A. and C.

If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair *at the expiration of his tenancy*, the agreement between A. and C. need not be produced to prove such averment.

BEST, C. J., was of opinion, that evidence of the time

1826.
 {
 GOODSON
 v.
 GOULD-
 SMITH.

when Mrs. Le Blanc actually left the premises, was sufficient, without the production of the agreement, because the plaintiff was no party to the agreement. His Lordship also thought, that the words in the declaration, "at the expiration of her tenancy," might be rejected as surplusage; and it was immaterial when Mrs. Le Blanc quitted, because at that time, whenever it was, the defendant might have entered to make the repairs.

The case was afterwards referred.

Vaughan, Serjt., and *Parke*, for the plaintiff.

Bosanquet, Serjt., and *Rotch*, for the defendant.

[Attornies—*Barendale & Co.*, and *Brown*.]

COURT OF KING'S BENCH.

Sittings at Westminster, after Hilary Term, 1827,

1827.
 {

BEFORE LORD CHIEF JUSTICE ABBOTT.

Feb. 13th.

RAGGETT v. MUSGRAVE, Bart.

If the rules of a club be contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them.

ASSUMPSIT by the plaintiff, as master of the Cocoa-tree Club, against the defendant as one of its members, to recover 10*l.* 10*s.*, the amount of the defendant's subscription for the year 1825.

It was proved that the defendant had been a member of the club, and that all the members on their admission agreed to conform to the rules. The rules were put in. By the 1st of them, the club was to consist of three hundred members, at an annual subscription of ten guineas each. By the 8th, every member intending to withdraw from the club, was to signify his intention in writing to the

master, and pay his subscription for the current year; and by the 18th, the plaintiff was appointed master of the club. It appeared that the whole of the rules of the club were contained in a book kept by the master, which was accessible to all the members, but that the rules were neither posted up nor sent to the members.

Scarlett, for the defendant, objected, that there was no proof that the defendant knew of these rules.

ABBOTT, C. J.—I am of opinion, that every member of a club must be presumed to be acquainted with its rules.

Verdict for the plaintiff—Damages, 10*l.* 10*s.*

Gurney and *Chitty*, for the plaintiff.

Scarlett and *Thesiger*, for the defendant.

[Attornies—*Fisher & S.*, and *Arnott & M.*]

See the case of *Raggett v. Bishop*, ante, p. 343.

TRUWHITT v. DEPREE.

Feb. 14th.

DEBT by the plaintiff as clerk to the commissioners for paving the Savoy precinct, against the defendant, for the amount of a paving rate due from him as occupier of a house and stables.

By a private act of Parliament, 57 Geo. 3, c. 29, the commissioners are empowered to cause actions to be brought for the recovery of paving rates; and they may, under that act, sue and be sued by their clerk.

The appointment of the plaintiff as their clerk was proved by the production of the commissioners' minute book, which contained his appointment; and it was also proved that the rate was duly made; and that the defendant occupied the property in question.

Marryat for the defendant, submitted, that it should be proved that the plaintiff had the sanction of the commissioners to commence the present action.

If certain commissioners under a private act of Parliament may sue and be sued by their clerk, it is not necessary, at the trial of an action brought in the name of the clerk to prove that he sues by their authority.

1827.
RAGGETT
v.
MUSGRAVE.

1827.
 TRUWHITT
 v.
 DEPREZ.

ABBOTT, C. J.—Can I take it that the clerk of the commissioners has brought this action without their authority? If he had done so, the defendant could have staid the proceedings.

Verdict for the plaintiff.

Scarlett and Platt, for the plaintiff.

Marryat, for the defendant.

[Attornies—*Truwhitt*, and *Noy & Co.*]

See the case of *Doe d. Clark and Others v. Spencer*, ante, p. 79.

Feb. 14th.

PAINE v. PRITCHARD.

In trover for a bill of exchange, the Jury may, if they think fit, include the amount of the interest in the damages, and this although there is no mention of interest in the declaration, and no special damage laid.

TROVER for a bill of exchange for 100*l.*—It appeared that the bill came into the possession of the defendant in the year 1822, and that it belonged to the plaintiff.

ABBOTT, C. J., had directed a verdict for the plaintiff.

Scarlett, for the plaintiff, asked for interest on the bill.

ABBOTT, C. J.—As a matter of law, I think you are entitled to interest.

Gurney, for the defendant.—There is nothing in the declaration about interest; and no special damage is alleged; so that, even if a plaintiff could entitle himself to interest under any form of declaring, I submit that he cannot recover it on this form of declaration.

ABBOTT, C. J.—I think that the plaintiff is entitled to interest, if the Jury choose to give it; and I shall leave it to them to say, whether they will give interest or not.

Verdict for the plaintiff—Damages, 115*l.* being the amount of the bill and three years' interest.

Scarlett and Chitty, for the plaintiff.

Gurney and F. Pollock, for the defendant.

[Attornies—*J. Hunt*, and *Virgo*.]

1827.

PAINÉ

v.

PRITCHARD.

EDIS v. BURY.

Feb. 17th.

ASSUMPSIT for goods sold.—The only question of law in this case was, whether the following instrument was a bill of exchange, or a promissory note. It was in these words:—

“ £44 : 11 : 5.

5th August, 1826.

“ Three months after date, I promise to pay to Mr. Edis 44*l.* 11*s.* 5*d.* for value received.

J. Bury.”

To Mr. J. B. Gautherd,
35, Montague Place, Bedford Square.”

It was *accepted* by Gautherd, and *indorsed* by the defendant.

If it be ambiguous whether an instrument be a bill of exchange or a promissory note, the person who receives it may treat it as either. An instrument which is in the form of a note, but which is in addition addressed to a third party, who accepts it, is a promissory note.

Brougham, for the plaintiff.—I submit that this paper is clearly not a bill of exchange, but a promissory note; and if it were even doubtful, we have a right to treat it as a promissory note as against this defendant, who has himself made it one; and his having added the name of an acceptor cannot alter the nature of the instrument. Our remedy is not taken away against the maker of the note, because we may also have a remedy against the person who may have put his name on it as acceptor.

Campbell, for the defendant.—The plaintiff is bound by his own election in taking this instrument as a bill of exchange, and treating it as such. He takes it, directed to a third person, accepted by that third person, and indorsed by the defendant. It is presented by the plaintiff when due, and notice is given of the dishonour to the drawer; and the plaintiff cannot therefore now treat it as a pro-

1827.

EDIS

v.
BURY.

missory note for the first time, but must be bound by his own option.

He then called a clerk of the plaintiff's bankers, who proved that they presented the paper, as a bill for payment, when due, and gave notice of the dishonour to the defendant as drawer.

Brougham, in reply.—The *apprehension* of the plaintiff can make no manner of difference in the case. It cannot alter the structure of the instrument. We are therefore entitled to a verdict for the amount.

ABBOTT, C. J.—As at present advised, I am clearly of opinion that this is a promissory note: that is my strong opinion: but I will reserve the point for the defendant.

Verdict for the plaintiff.

Brougham and *Pattison*, for the plaintiff.

Campbell, and *F. Pollock*, for the defendant.

[Attornies—*Elgie*, and *Nicholson*.]

IN the ensuing Term, *Campbell* moved for a rule to shew cause why a nonsuit should not be entered, on the ground that the instrument in question was a bill of exchange, and not a promissory note. But the Court held, that if it were equivocal, whether the instrument were a bill of exchange or a promissory note, the party receiving it might treat it as either; but their Lordships considered this instrument to be a promissory note.

Rule refused.

<p>Mr. Justice <i>Bayley</i> lays down, (Bills of Exchange, p. 4), that no particular words are necessary to make a bill or note; any order or promise, which, from the time of making it, cannot be complied with or performed without the</p>	<p>payment of money, is a bill or note. Thus an order or promise to deliver, or that J. S. shall receive money, or to be accountable or responsible for it to him, or order, is a good bill or note: but a mere acknowledgment of a debt, with</p>
---	--

out any promise to pay, is not a bill or note.

In the case of *Chadwick v. Allen*, 1 Str. 706, the plaintiff declared on the following instrument as a promissory note—"I do acknowledge that Sir Anthony Chadwick has delivered me all the bonds and notes, for which 400*l.* were paid him on account of Colonel Synge; and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10*l.*, which 10*l.* and 15*l.* 5*s.* balance due to Sir Andrew I am still indebted, and do promise to pay." There was a demurrer to the declaration, and judgment for the plaintiff.

In the case of *Morris v. Lee*, 2 Ld. Ray. 1396, 1 Str. 609, and 8 Mod. 326, a note, whereby the defendant promised "to be accountable to A., or order," was held to be rightly declared on as a promissory note, by the plaintiff, who was the indorsee; and the Court said, that "there are no precise words necessary to be used in a promissory note or bill of exchange. Deliver such a sum of money, makes a good bill of exchange."

In the case of *Shuttleworth v. Stephens*, 1 Camp. 407, the following was declared on as a bill of exchange:—

"21st October, 1804.

"Two months after date, pay to the order of John Jenkins, 78*l.* 11*s.* value received.

Thomas Stephens.

At Messrs. John Morson & Co."

Lord *Ellenborough* held, that this was properly declared on as a bill of exchange, although per-

haps it might have been treated as a promissory note, at the option of the holder..

And in the case of *Allan v. Mawson*, 4 Camp. 115, *Gibbs, C. J.*, held an instrument in the same form to be rightly declared on as a bill; but in that case the Jury found that the word "at" had been written very small, with intent to deceive any person who might take the instrument.

In the case of *Green v. Davis*, 6 Dow. & Ry. 306, the following was held to be a promissory note:—

"Received of Mr. Boaz, 100*l.*, which I promise to pay with lawful interest. J. Davis."

And the Court were of opinion, that as it bore a 3*d.* receipt stamp and a 1*l.* agreement stamp, it was not admissible in evidence, for want of a proper note stamp.

With respect to I. O. U.'s it was held in the case of *Fisher v. Leslie*, 1 Esp. N. P. C. 225, that a slip of paper having on it, "I. O. U. eight guineas," was a mere acknowledgment of a debt, and not a promissory note or a receipt, and therefore admissible in evidence without a stamp.

In the case of *Israel v. Israel*, 1 Camp. 499, Lord *Ellenborough* received the following in evidence as an acknowledgment of a debt, without being stamped,

"I owe my father 470*l.*

James Israel."

But in the case of *Gray v. Harris*, 1 Camp. 501 n., Lord *Eldon, C. J.*, is said to have held that an I. O. U. could not be received in evidence without a stamp, being promissory note. However, in the case of *Childers v. Bulnois*, Dow.

1827.

Edis

BURY.

1827.

EDIS
v.
BURY.

& Ry. N. P. C. 8, which was an action for money lent, the plaintiff put in two slips of paper, signed by the defendant in the following terms;—"I.O.U. 400l.," and "I.O. U. 250l.," but neither of them had any stamp, date of time, or place of address. The plaintiff also called a witness, who proved, that the plaintiff and defendant met in the street, when the former said to the latter, "I must have some money to-day;" to which he replied, "you cannot have any to-day, but you shall have 200l. to-morrow, and a bill for the rest, which you may get discounted;" it

was objected, that the papers required to be stamped, and that the conversation did not shew a specific claim on the part of the plaintiff, or a specific acknowledgment on the part of the defendant. But *Abbott, C. J.* was of opinion, that he was bound to receive both the written and parol evidence produced, but left it to the Jury to say, whether, even combined, they were sufficient to convince them that the plaintiff was really entitled to the sum which he sought to recover from the defendant in this action; and the Jury found for the defendant.

Feb. 20th.

RAIKES v. RICHARDS.

Evidence.

In an action on the case for a libel in a newspaper. The plaintiff cannot give evidence of the contents of a placard posted in the window of a third person, although the placard states what *will appear* in the defendant's newspaper respecting the plaintiff, and that which it foretold does appear accordingly.

CASE for several libels. Plea.—General Issue. The libels declared on were published in a newspaper called the *Age*, of which the defendant was the registered proprietor.

A witness stated that at a shop in Bond Street, he had seen placards announcing what the *Age* newspaper of the ensuing Sunday would contain; and that those placards mentioned the name of Mr. Raikes.

Brougham, for the defendant.—I submit that this placard is not evidence against the defendant. It is only proving that other persons have printed the plaintiff's name, and stuck it up.

Scarlett, contra.—The placard announces that something relating to Mr. Raikes will appear in the next Sunday's *Age*; and we shall prove that it did appear. It is therefore evidence against Mr. Richards, because the placard foretels what he is going to do, and he afterwards

does it. It is therefore reasonable evidence that he was the author of the placard.

1827.

RAIKES

v.

RICHARDS.

ABBOTT, C. J. — I think this is too remote: a person riding or walking down Bond Street sees a placard, and there is no evidence to shew, that it was published by the defendant. The persons at the shop might have been called to shew that they had received the placards from the defendants, but that is not done. I think the evidence does not sufficiently connect him with the publication of them.

Verdict for the plaintiff.—Damages, 40s.

Scarlett, Denman, C. S. and Adolphus, for the plaintiff.

Brougham, for the defendant.

[Attornies—*Capron & Co.*, and *Harmer*.]

REX v. CHARLES EDMUND GRINDALL.

Feb. 20th.

PERJURY. The indictment stated, that upon a certain information upon oath, intituled, “The information and complaint [it here set out the title of the information] the defendant falsely, maliciously, wilfully and corruptly, did swear, say, and depose in substance, and to the effect following, that is to say: ‘the defendant (meaning the said Charles Gardner), I (meaning the said C. E. Grindall), am certain is one of the persons that assaulted and otherwise illtreated my wife, (meaning one Jane Grindall), on the 17th day of September, &c.’ [following the words of the deposition to the end] whereas in truth, &c. C. Gardner did not assault,” &c. The information on which the perjury was assigned, was taken on oath before *H. M. Dyer*, Esq. on a charge of assault preferred by Mrs. Grindall against Charles Gardner. The information was in the following terms:

If an indictment for perjury charge that the defendant falsely swore to certain facts, and the deposition appear to be joint, and that his wife first deposes to the facts, and then the defendant swear that he is sure that A. B. is one of the persons who assaulted, &c. This is no variance, as it is sufficient for the indictment to state the substance of what the defendant swore.

1827.
 }
 Rex
 v.
 GRINDALL.

“Middlesex to wit:—The information and complaint of Jane, the wife of Charles Edmund Grindall, of, &c. And of the said Charles Edmund Grindall, made on oath on the 22d of November, in the year 1826, before me, *Henry Morton Dyer*, Esquire, one of his Majesty's Justices of the peace, &c. upon the examination, and in the presence, and hearing of Charles Gardner, then and there charged with an assault. And first the said Jane Grindall for herself saith, that the defendant is one of the persons who assisted W. J. Stinton and others, in handcuffing and otherwise assaulting me, on, &c. (Signed) Jane Grindall.

“And the said Charles Edmund Grindall sworn, says, the defendant, I am sure, is one of the persons that assaulted and illtreated my wife, on the 17th day of September last, at No. 19 Judd Place, Somers Town; between the hours of 7 and 9 o'clock in the evening.

Sworn before me, }
H. M. Dyer. } (Signed) C. E. Grindall.”

Brougham, for the defendant.—I submit that there is a fatal variance between the indictment and the information. The indictment sets forth the deposition as sworn by the defendant alone. The information read in support of this, sets forth the oath of Mrs. Grindall, and then goes on, as a continuation, and says, that the defendant stated so and so. Now it is very different to say that one swore that a man committed an assault on A. B., and to say that A. B. swore so and so, and that A. B. having done so, the defendants afterwards swore it.

ABBOTT, C. J.—That is matter of observation.

Brougham.—I submit it to your Lordship as matter of variance.

ABBOTT, C. J. — I think that what the defendant swore is set out in *substance*, which is enough.

The defendant was acquitted, the Jury considering that he was mistaken in the person of Charles Gardner.

1827.

 REX
 v.
 GRINDALL.

Adolphus, for the prosecution.

Brougham and Chitty, for the defendant.

[Attornies—*Gattie & Co.*, and *Sweet & Co.*]

COWLES *v.* DUNBAR and CALLOW.

Feb. 23d.

FALSE imprisonment. The defendant Dunbar pleaded, first, the general issue; and second, a justification, that his house had been robbed, and that in consequence he kept a look out; and that seeing the plaintiff, in a suspicious manner, and under suspicious circumstances, carrying a chest of drawers, which the defendant Dunbar believed to be those which had been stolen from his house, and vehemently suspecting, &c. he took the plaintiff to a watch-house till he had inquired; and that finding that no sufficient proof could be obtained, he caused the plaintiff to be discharged. Replication *de injuriâ*. The defendant Callow, who was a constable, pleaded the general issue (a).

It appeared that a house belonging to Mr. Dunbar, and situate in Patriot Square, had been robbed of a great variety of articles, about a week before the imprisonment in question. And that Mr. Dunbar kept watch at another house, to see if any further robbery should be committed; and that at about six o'clock, in the morning of the 26th of

[If a reasonable charge of felony be made against a person, who is given in charge to a constable, the constable is bound to take him, and will be justified in so doing, although the charge may turn out to be unfounded. If a person be taken by a private individual without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself, so as to excite suspicion; this only goes in mitigation of damages, if it turn out that no

felony was committed. The stat 3 Geo. 4, c. 55, s. 21, which relates to the apprehension of *reputed thieves* without warrant, only extends to persons *generally reputed* to be thieves, and not to persons suspected of a particular theft.

(a) See *ante*, Vol. 1, p. 41, n. (a). And in the case of *M'Cloughan v. Clayton*, Holt, N. P. C. 478, it was held, that in a case like the present, the constable might give

the special matter in evidence under the general issue; but that a party giving another in charge to a constable, must plead specially.

1827.
 COWLES
 v.
 DUNBAR.

March, 1826, seeing the plaintiff carrying a chest of drawers, which he suspected to be his, in a direction in which he would have come if he had brought them from his house, went up to the plaintiff, and asked him who he was; that the plaintiff stated himself to be a labourer in the London Docks, but refused to tell his name, (however as to this there was some contradiction), whereupon Mr. Dunbar threatened to send him to the watch-house; that, on this, the plaintiff set down the drawers and ran away; whereupon Mr. Dunbar presented a pistol at him, and pursued him, and having overtaken him, delivered him into the custody of the other defendant, who was a constable. It further appeared, that the defendants made some inquiries, and then discharged the plaintiff, without taking him to any magistrate.

Scarlett, for the defendant Dunbar.—I submit that if a person so acts as to place himself in the reasonable suspicion of having committed a felony, such person may be legally taken into custody: but even if your Lordship holds, that in general if you take a man without warrant, you will be only justified in case the man so taken was guilty; yet, by the stat. 3 Geo. 4, c. 55, s. 21 (a), it is

(a) By the 21st sect of this stat. (which was passed for regulating the police of the metropolis) after reciting that, ‘Whereas ill disposed and suspected persons, and reputed thieves frequent the parks, fields, streets, highways and places adjacent, and divers places of public resort, and the avenues leading thereto, within the City of London and the liberties thereof, the limits of the weekly bills of mortality, and the said parishes of Saint Mary-le-bone, Paddington, Saint Pancras, Kensington, and Saint Luke, Chelsea, and also the said river Thames, and the

docks and creeks, quays and warehouses adjacent thereto, and the streets, highways and avenues leading to the said river, docks, creeks, quays and warehouses, with intent to commit felony on the persons or property of his Majesty’s subjects; and although their evil purposes are sufficiently manifest, the power of his Majesty’s Justices of the peace to demand of them sureties for their good behaviour, hath not been of sufficient effect to prevent them from carrying their evil purposes into execution;’ it is enacted, “that it shall be lawful for any consta-

enacted, that any person may apprehend suspected persons and reputed thieves. Now you cannot tell that a man is a reputed thief, except by his conduct. If you find him under suspicious circumstances, as, if a robbery has been committed, and a man is seen carrying away goods, who, when called to, will not stop, but tries to escape, and will give no account of himself, I submit that these are ample grounds for detaining him.

1827.
 COWLES
 v.
 DUNBAR.

ABBOTT, C. J.—This act is not intended for cases of this kind, but it is intended to apply to persons generally reputed to be thieves. Taking the preamble, which is referred to by the words “such suspected person,” it appears clearly to apply to persons who are known to be reputed thieves.

Brougham, for the defendant Callow, contended, that when a person gives charge of another to a constable, the constable is bound to take him; and submitted that this defendant ought to be acquitted.

ABBOTT, C. J.—A constable is obliged to act if there is a reasonable charge of felony: whether there was such here, is for the Jury to say. I doubt whether I can direct an acquittal.

ble, headborough, patrol, watchman or other person, to apprehend every such suspected person or reputed thief, and convey him or her before any Justice of the peace; and if it shall appear before the said Justice, upon the oath of one or more credible witness or witnesses, that such person is a person of evil fame and a reputed thief, and such person shall not be able to give a satisfactory account of himself or herself, and of his or her way of living, and it shall also appear to the sa-

tisfaction of the said Justice, that there is just ground to believe that such person was in or on such park, field, street, highway, river, dock, creek, quay, warehouse, avenue or other place as aforesaid, with such intent as aforesaid, every such person shall be deemed a rogue and vagabond, within the intent and meaning of an act made in the present session, for consolidating and amending the laws relating to rogues, vagabonds, and other idle and disorderly persons.”

1827.
 COWLES
 v.
 DUNBAR.

Scarlett addressed the Jury for the defendant Dunbar, in mitigation of damages.

ABBOTT, C. J. (in summing up to the Jury). — The cases of the two defendants are very distinguishable from each other. Callow is a constable, and if a reasonable charge of felony is given, he is bound to take the party into custody; and if that were so here, he is entitled to your verdict. Mr. Dunbar, who gave charge of the plaintiff, was a person of some consequence in the neighbourhood, and if Callow was acting fairly and honestly in the discharge of his duty, you will say he is not guilty. Mr. Dunbar has pleaded a justification, which he has failed to make out, a verdict must therefore be found against him. The plaintiff refused to give an account of himself, and if a man be found under suspicious circumstances, and confirms the suspicion by refusing to give an account of himself, he cannot expect large damages, if he is illegally detained; but, as to this there is some contradiction; however, Mr. Dunbar appears to have acted upon a fair suspicion, and *bonâ fide* (a).

Verdict for the plaintiff, against the defendant Dunbar,—Damages 100*l*.

Verdict for the defendant Callow.

(a) If a felony *be committed in fact*, and A. suspects B. did it, and hath probable cause of suspicion, A. may arrest B. for it, and justify it in an action of false imprisonment. 1 Hale, P. C. 588. It was formerly considered, that even a constable could not justify detaining a party upon a charge given to him, if it turned out that no felony had been committed: but this was held otherwise as to constables in the case of *Samuel v. Payne*, Doug. 345; where it was decided that after a

charge fairly given to him, a constable might justify detaining a man, although the Jury should be satisfied that no felony had been committed. And the same point was held by *Buller, J.* as to a charge of breach of the peace. 4 Camp. 421. In the case of *Lawrence v. Hedger*, 3 Tannt. 13, it was held, that watchmen and bea- dles are justified, at common law, in arresting persons found in the streets at night, with bundles, &c. under suspicious circumstances, although it may afterwards ap-

Gurney, and *Archbold*, for the plaintiff.

Scarlett, and *Chitty*, for the defendant Dunbar.

Brougham, for the defendant Callow.

1827.

COWLES
v.
DUNBAR.

[Attornies—*Gray, Junr.*, and *Young & Co.*]

pear, that no felony had been committed.

In the case of *M'Cloughan v. Clayton*, Holt, N. P. C. 478, it was held by *Bayley, J.* that a constable taking a person into his custody, on a charge of felony,

given to him, might, on ascertaining the suspicion to be groundless, discharge him without going before a Justice.

See also the very able note of the learned reporter, appended to that case.

Adjourned Sittings in London after Hilary Term, 1827.

FLETCHER and Others, Assignees of BILLINGE, a Bankrupt, v. FROGGATT.

March 3rd.

ASSUMPSIT on a bill of exchange for 200*l.*, by indorsee against drawer. Sufficient notice of dishonour had not been given; but a witness was called, who stated, that in a conversation with the defendant about the bill in question, the defendant said "I do not mean to insist upon want of notice; but I am only bound to pay you 70*l.*" Something was then to be done by some other person in the course of the day on which the conversation took place; and the defendant added, "I will call to-morrow morning, and see that all is arranged satisfactorily."

If the drawer of a bill for 200*l.*: not having received due notice of its dishonour, say, that he does not mean to insist upon want of notice, but add, that he is only bound to pay 70*l.*; the whole of his statement must be taken together, and the holder in an action against him can only recover to the amount of the 70*l.*

Hill, for the defendant, submitted, that at least this admission would only entitle the plaintiffs to the sum mentioned in it.

Scarlett, for the plaintiffs, contended, that as it was a

1827.
 FLETCHER
 v.
 FROGGATT.

waiver of the objection on the ground of want of notice, it would entitle the plaintiffs to recover the whole amount of the bill.

ABBOTT, C. J.—The defendant does not say that he will pay the bill, but that he is only bound to pay 70*l*. I think the plaintiffs must be satisfied with the 70*l*.

Verdict for the plaintiffs, 70*l*.

Scarlett, for the plaintiffs.

Hill, for the defendants.

[Attornies—*J. James*, and *Froggatt*.]

March 9th.

EAST v. CHAPMAN.

Sembla, that in an action for a libel, evidence of facts, which do not amount to a justification, may, under circumstances, be received in mitigation of damages, though special pleas of justification, which were on the record, have been withdrawn before the trial, and the plaintiff in consequence is not prepared with evidence to answer the defendant's proof.

A witness, who has given evidence on his examination in chief, as to the truth of a libel, may be asked on his cross-ex-

amination, whether the MS. of the libel was not written by him, and he is bound to answer the question.

ACTION for a libel in the Sunday Times newspaper, purporting to be an account of certain proceedings which took place at a coroner's inquest. Plea—The general issue. There appeared upon the record several special pleas of justification; but they were struck through with a pen. Some of the pleas averred the truth of the facts, and some only stated that the circumstances mentioned in the libel did occur, as reported, before the coroner's inquest.

Scarlett, in stating the plaintiff's case, was reading the special pleas from the record.

Denman, C. S. for the defendant, objected—because they must be now taken as not forming any part of the record.

ABBOTT, C. J.—I think, that as it will be competent to the plaintiff to prove by distinct evidence the fact of the

pleas having been pleaded, and afterwards withdrawn, it is just as well to take it from the engrossed record.

1827.
EAST
v.
CHAPMAN.

Evidence was afterwards given of this fact *aliunde*. The libel was read. It was headed as follows: "Alleged Rape and Death, and Coroner's Inquest." It purported to be an account of the proceedings at a Coroner's Inquest holden on the body of a girl named Maria Webb, who died of a miscarriage; and among other circumstances it stated, that Webb, the brother of the deceased, said before the Jury, that the deceased told him, shortly before she died, that East (the plaintiff) had taken liberties with her, and had had connection with her by violence. The account went on to say, that Mr. Shearman, the surgeon, and Mrs. Buckingham, corroborated the evidence of Webb; and concluded by stating, that the Jury warmly declared their opinion of the conduct of Mr. East, and expressed their readiness to render any assistance in their power in bringing him to justice.

Denman, C. S., for the defendant, inquired of the Court, whether he was at liberty to give evidence as to the fact of what was stated having taken place at the inquest.

ABBOTT, C. J.—You must tender the evidence, and let us hear whether it is objected to.

Denman, C. S., then proceeded to address the Jury, and was contending that the defendant was entitled to a verdict on account of the correctness of the report, when he was interrupted by

ABBOTT, C. J., who said, that he was clearly of opinion, that the proposed evidence, if receivable at all, could only be so in mitigation of damages.

Denman, C. S.—The only way in which I can put it for the verdict, is, that the Jury may say, that, considering the occasion, it is an innocent publication.

1827.
EAST
v.
CHAPMAN.

Mr. Bell, the clerk to the Coroner, was called on the part of the defendant; and stated, that he was present at the inquest alluded to in the libel, and that William Webb, the brother of Maria, the deceased, was examined as a witness. Mr. Bell stated, that he was present when the Jury returned their verdict; and he produced the inquisition. The finding of the Jury was, that the deceased died by the visitation of God, and not otherwise.

The following question was then put to the witness:—
“ Did you hear the Jury by their foreman accompany the verdict with any observations touching the subject matter of the inquisition, or touching the present plaintiff?”

Scarlett, for the plaintiff. —I shall not argue the point as to the propriety of this question: I only wish it to be understood that I do not consent to the reception of the evidence, if your Lordship shall be of opinion that it is not receivable consistently with law; and for this reason, that the briefs for the plaintiff originally contained evidence to rebut the special pleas; but those pleas being withdrawn, the plaintiff has not now his witnesses in Court. If your Lordship thinks, that on general grounds the evidence is admissible, I shall not offer any argument on the subject.

ABBOTT, C. J. —It appears to me, that I am bound to decide, without reference to what has taken place with regard to pleading any matter, and afterwards withdrawing it; and being required so to do, I am of opinion, that the evidence is to be received, but only in mitigation of damages. If the evidence could lead to a verdict, I should be most clearly of opinion that it could not be received; for he who would allege the truth of a libel, is bound to do so by a plea on the record; and there being no such plea in the present case, I am clearly of opinion that such evidence, whatever it may be, cannot be received as going to the verdict, but as evidence to guide the Jury in the estimation of damages. I do not say generally that such

evidence is admissible, but I think it is so under the circumstances of this case. That which is short of the justification, may, I think, be received in mitigation of damages. It is a question of great importance; and I am ready to be set right in any way, if my opinion should be wrong.

1827.
EAST
v.
CHAPMAN.

The examination of the witness was then resumed; and he stated, in answer to the question, that the Jury generally expressed themselves indignantly as to the supposed conduct of the plaintiff, and offered Webb their assistance in any way in bringing him to justice, and that several of the Jury observed, that they were willing to subscribe for the purpose.

The witness then proceeded to give further evidence of what took place at the inquest, (but which was not taken down in writing), and was asked by *Scarlett*, on his cross-examination, whether the MS. of the libel was not in his hand-writing. He appealed to the Court to say, if he was bound to answer.

ABBOTT, C. J. — I think, having given evidence, you must answer the question. You might have objected to give evidence at first; but having gone through a long history of what passed, and was not taken down, you must still go on, otherwise the Jury will only know half of the matter.

The witness then acknowledged that it was his hand-writing. Several other witnesses were called; but from their evidence it appeared that the report in the libel varied in several particulars from the facts as they took place at the inquest, particularly in that part where it was stated that two witnesses corroborated the evidence of Webb.

ABBOTT, C. J., in his summing up (*inter alia*) said,— Whether the evidence received in mitigation of damages was admissible or not, may perhaps be matter of doubt;

1827.
 EAST
 v.
 CHAPMAN.

but where there is doubt, I think it best to receive it. Now, however, the evidence is received, it appears clearly, that in whatever way it is taken, whether as matter of justification or otherwise, it is not sufficient to sustain the defence; because the libel states that two witnesses corroborated the evidence of Mr. Webb, and it appears that there was no corroboration of that part of his testimony which relates to the alleged rape. It is said to be the duty of a newspaper editor to publish such accounts as these. I do not know that the duty of an editor of a newspaper differs from that of any other person. I take it to be the duty of every man, whether editor, publisher, or speaker, to take care that what he utters may not have the effect of injuring the character of another. Editors of newspapers also should confine themselves to truth, for another reason, *viz.*, that things not true, though they may not consist of reflections on the character of another, yet may mislead the public, and leave false impressions on the mind of the reader.

Verdict for the plaintiff.

Scarlett and Chitty, for the plaintiff.

Denman, C. S., and *Brougham*, for the defendant.

[Attornies—*Gregory & Son*, and *Willett*.]

March 9th.

HEWLETT and Others, Executors and Executrix of
 JUDKIN v. LAYCOCK and Another.

When a cause
 is referred to ar-
 bitration, the
 mode of con-

ducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attornies, and examine witnesses privately, at their (the witnesses') houses, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time that he intends to rely on it as an objection; and if he lie by and suffers other meetings to take place, and when the arbitrators are ready to make their award, revokes his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award.

THE declaration stated, that by an order of Mr. Justice
Bayley, of the 10th of March, 1824, a cause between the

plaintiffs and defendants, together with all matters in difference, was referred to the arbitration of three persons, one of them to act as umpire; and that the defendants, when the said umpire was about to make his award, revoked their submission, whereby the umpire was prevented from making an award, and the plaintiffs lost the benefit which they would have derived from the reference.

It appeared that the arbitrators, after the first or second meeting, which was in the month of April, 1824, refused to allow the attornies for the parties to attend the meetings, and at a later period excluded the parties themselves; and they also examined witnesses at the witnesses' own houses, and said they so acted to prevent altercation and delay. The attornies protested against such a course of proceeding, but did not give any notice that they should consider it a ground of objection to the award. Other meetings were afterwards had, and on the 20th of December, when the arbitrators were ready to make their award, the defendants revoked their submission. It appeared that the award would have been in favour of the plaintiffs.

Marryat, for the defendants.—This is a case very much of first impression. The plaintiffs will have a right to begin *de novo* for any cause of action which they rightfully have. But they cannot recover in this action; because the arbitrators acted illegally in deciding not to admit the attornies. The arbitrators had no right to examine witnesses privately; and if they were not warranted by law in acting as they did, then the revocation was correct, and no action lies. There was not a sufficient reason for the exclusion of the attornies. If the arbitrators misjudged, that is enough: it is not necessary to show any improper feeling. Arbitrators may be imposed upon, if the parties or their attornies are not present to suggest questions relevant to the subject of examination.

1827.
HEWLETT
v.
LAYCOCK.

1827.
HEWLETT
v.
LAYCOCK.

Scarlett, for the plaintiff.—The refusal to admit the parties, *if done corruptly*, would be a good ground of objection, and in such case no revocation would be necessary. Perhaps, at the time of the refusal, the parties might have revoked the submission, but they suffered the arbitration to go on, and kept their objection as it were in *petto*, to be used or not, according to the way in which the award should appear likely to go. The neglect to give notice of any objection, on the ground of exclusion or any intention to revoke on that ground, must be considered as an acquiescence or waiver on the part of the defendants.

ABBOTT, C. J. — The reason urged in support of the revocation is, that the arbitrators thought proper to exclude the parties and their attornies, and to examine a witness at his own house. I do not see why they might not examine the witness at his own house as well as elsewhere, as they were to examine the witnesses separately. I think, taking all the evidence together, that neither of the arbitrators intended to act otherwise than honourably and honestly in the transaction. But it is said, that the defendants had a right to make the revocation in point of law. I do not think it necessary to decide that point, because I am perfectly satisfied, in point of law, that if a party means to object on such a ground as that which is relied on in this case, it is his duty to give notice that he means to rely on it, otherwise it is no answer. For unless he gives such notice, the arbitrators go on thinking that the objection is waived, and the parties are put to unnecessary expences. As to the exclusion complained of, I think it right, in my situation, to say, that where parties refer to a private tribunal, the mode of conducting the inquiry must be left to the arbitrators, and there may be circumstances in which it is important to exclude attornies. There is less reason certainly for excluding the parties themselves, but where both parties are excluded, there is no reason of complaint.

Verdict for the plaintiffs.

Scarlett and Campbell, for the plaintiffs.

1827.

Marryat and Moody, for the defendants.

[Attornies—*North & S.*, and *Stevens & W.*]

RANDALL v. EVEREST.

March.

ASSUMPSIT. The plaintiff sought to recover a sum of 100*l.* to part of which he claimed to be entitled, in consequence of the non-performance of an agreement. The defendant contended that he was only entitled to a smaller sum.

Whatever may be the terms of an agreement with regard to the sum to be paid on the non-performance of it, the party suing, if the agreement is not under seal, is entitled only to such damages as a Jury, under all the circumstances, shall think fit to award.

ABBOTT, C. J., (in his summing up, made the following general observations):—I am of opinion, and I shall act upon that opinion, until I am corrected by a higher authority, that on any agreement, for the non-performance of which damages are sought to be recovered, whatever may be the expressions used by the parties, and in whatever mode or form the agreement may be made, whether the stipulation is for a sum to be paid as liquidated damages, or for a sum in the nature of a penalty, the plaintiff shall recover such damages as upon a view of the whole case, the Jury shall think fit to give, and no more.

The Jury found for the plaintiff,

Damages 100*l.*

ABBOTT, C. J., then said—I wish my observations to be understood as not applying to agreements under seal (a).

Marryat and Abraham, for the plaintiff.

Gurney, for the defendant.

[Attornies—*Matanle*, and *Glynes*.]

(a) For the note of these observations, we are indebted to the kindness of a friend at the bar.

1827.

April 19th.

HUNTER v. WESTBROOK.

A father gave his son a watch, some printed books, and several articles of wearing apparel.—*Held*, that though the son was under age, (*viz.* about sixteen years old,) the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son.

TROVER by the father of a youth about sixteen years of age, (who had been apprenticed to the defendant, in the business of a chymist and druggist, and had left his master without his consent,) to recover a watch, some printed books, and several articles of wearing apparel, which it was alleged the defendant refused to deliver up.

On the cross-examination of the son, who was called as a witness in support of the plaintiff's case, he said, that the articles in question had been given to him by his father.

ABBOTT, C. J., upon this intimated to the plaintiff's counsel, that he thought the plaintiff must be nonsuited.

Campbell, for the plaintiff, submitted that the son was not emancipated, and that the property must be considered as belonging to the father. It had been decided, that in an indictment, property in the situation of that sought to be recovered in this action, might be laid as the property of the father.

ABBOTT, C. J.—I am of opinion that the action is not maintainable. I believe it has been held, that things stolen from a child may be laid to be the property of the parent, but I think that has been in the case of very young children. There must be a right of possession to maintain trover, which right this plaintiff has not. I am clearly of opinion that the plaintiff cannot recover.

Nonsuit.

Campbell, for the plaintiff, requested leave to move to enter a verdict for a shilling damages.

ABBOTT, C. J., inquired if there was any other defence.

Denman, C. S., replied in the affirmative.

His Lordship then said that he could not give the leave requested.

1827.

HUNTER
v.
WESTBROOK.

Campbell, and *R. V. Richards*, for the plaintiff.

Denman, C. S., and *Payne*, for the defendant.

[Attornies—*Van Sandau & Co.*, and *Pringle*.]

MAUD v. WATERHOUSE.

April 23rd.

ASSUMPSIT on an undertaking given on the 16th of September, 1825, to pay on the 20th of December, 1825, a bill of exchange, dated the 19th of September, for 267*l.* 12*s.*, which bill it was alleged the plaintiff accepted, for the accommodation of the defendant.

From the evidence for the plaintiff, it appeared, that, in the year 1823, the plaintiff sold goods to a person named Willis, trading under the firm of Willis & Co.; for the price of which goods, in the year 1824, he drew a bill on Willis, which was accepted by him. This bill became due in February, 1825; but in the month of January, 1825, Mr. Willis died, and his representatives not paying the bill, the plaintiff was obliged to take it up. After he had paid it, he wrote the following letter to the defendant, who had been a clerk in the house of Willis & Co., and still continued to manage the business of the concern:—

“ 15th April, 1825.

“ Mr. Maud presents his compliments to Mr. Waterhouse, and as he finds the Jamaica Packet has arrived, would feel obliged to him if he would name to his son some mode of receiving value for the outstanding acceptance of

If a person employed by the administrator of a deceased debtor, to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt.

1827.

MAUD

v.

WATERHOUSE.

Messrs. J. Willis & Co. He has heavy engagements at this moment, and it would be of great service to him," &c.

To this letter the defendant, on the same day, wrote the following answer:—

" Dear Sir,—In reply to your note handed to me by your son, I have to assure you that Mr. Willis and myself are aware of the inconvenience to yourself by the nonpayment of the acceptance of John Willis & Co., and at the same time feel equally disposed to offer the only remedy in our power, which would be by your drawing at two months the amount of the former acceptance on me, being authorised by Mr. B. Willis to conduct the mercantile concern of the late firm. If this mode will be available to yourself, I am perfectly conformable to it. I remain, &c.
John Waterhouse."

A bill of exchange was accordingly drawn by the plaintiff, and accepted by the defendant, dated the 16th of April, 1825, at two months. A few days before this bill became due the plaintiff called on the defendant at the counting-house, who told him that no funds of Willis & Co. had arrived, and he could not pay the bill. The plaintiff said that he could not ask his banker to discount for him another acceptance of the defendant, and suggested that the defendant should draw and he accept a bill at three months from the expiration of the other. This was agreed upon, and the defendant at the plaintiff's solicitation, gave him an undertaking in the following form:—

" Lime Street Square, 14th June, 1825.

" Dear Sir,—I engage hereby to furnish you with the amount of the acceptance drawn by me on the 17th September, say 267*l.* 12*s.*, due on the 19th of the same month. I am, &c.
John Waterhouse."

After this it was agreed that a further bill should be drawn and accepted by the same parties, at three months

from the expiration of the other, and this was the bill on the undertaking to pay which the plaintiff sought to recover. That undertaking was in the following words, and was written at the foot of the former undertaking:—

1827.
MAUD
v.
WATERHOUSE.

“ 16th September, 1825.—The above having been renewed, I engage to hand Messrs. Maud & Co. the same amount on the 20th December.”

On the part of the defendant it was proved, that he was only an assistant in the house of Willis & Co., that he had no interest whatever in the goods sold, and that he only superintended the concern since the death of Mr. J. Willis, at the request of his son Mr. B. Willis, who was his administrator. It was also proved that no funds had come to the hands of the defendant on account of the concern, which he could apply to the discharge of the plaintiff's claim.

Scarlett, for the defendant, upon this contended, that there was no consideration for the defendant's undertaking. He had no interest in the goods. He was merely employed as a clerk to wind up the concern, and not to make himself liable. Between the plaintiff and defendant there was no consideration at the first. The defendant is not the administrator, but was only employed by him.

Gurney, for the plaintiff.—It is a sufficient consideration that the plaintiff forbore to press his demand against the house of J. Willis & Co. The defendant's letter states that he was employed to conduct the concern. If he had not intended to make himself personally liable he would have signed his undertaking on behalf of B. Willis the administrator.

ABBOTT, C. J.—I am of opinion that there is a sufficient consideration to sustain the action. The arrangement

1827.

MAUD

v.

ATERHOUSE.

had the effect of preventing the administrator from being sued. I think the plaintiff is entitled to a verdict.

Verdict for the plaintiff.

Gurney and Stephen, for the plaintiff.

Scarlett and Payne, for the defendant.

[Attornies—*Forbes*, and *Cranch*.]

COURT OF COMMON PLEAS.

Second Sitzings at Guildhall, in Hilary Term, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

Feb. 1st.

TINSLEY v. NASSAU, Esq.

Trespass does not lie against a sheriff to recover damages for the seizure of property by his bailiff, under a writ of *levari facias* issued on a suit in the county court, because the sheriff is, in such case, a judicial and not a ministerial officer.

TRESPASS against the sheriff of Essex, to recover damages for the seizure of a horse which it was alleged belonged to the plaintiff.

The horse was seized as the property of Joseph Tinsley, a brother of the plaintiff's, who had been sued in the county court of Essex; and it was taken under a writ of *levari facias* by the bailiff of the defendant.

Brodrick, for the defendant.—This action cannot be maintained against the sheriff, because there was an action brought in the county court, of which the sheriff is a constituent part and not a mere officer. And the bailiff in this case stands in the same relation with regard to the sheriff as the sheriff in any of the superior courts does with regard to the court itself. *Holroyd v. Breare* &

Holmes (a), is in point upon this subject; and that case has been since acted upon by Mr. Justice *Bayley*, on the Northern Circuit. That is the case of a court baron; but the court baron and the county court are similar, as in both the suitors are the judges, and the sheriff in one case and the steward in the other are judicial officers.

1827.
TINSLEY
v.
NASSAU.

The writ was read. It was directed to the bailiff by the sheriff, commanding him to levy, &c., and ended with the words: "and *have you there* the said money," &c., the usual conclusion of an authority to seize given to a bailiff by the sheriff being "that *I may have* the said money," &c.

Wilde, Serjt., for the plaintiff.—The form of the writ by the sheriff will not conclude the question.

BEST, C. J.—I apprehend that the sheriff sits in the county court as the first freeholder in the county, the other suitors are also judges; but the sheriff is the principal, and a sort of chief justice.

Wilde, Serjt.—The sheriff is indemnified by the plaintiff.

BEST, C. J.—That cannot make any difference.

Nonsuit.

Wilde, Serjt., and *R. V. Richards*, for the plaintiff.

Brodrick, for the defendant.

[Attornies—*Jones*, and *North & S.*]

(a) 2 B. & A. 473. The steward of a court-baron is a judicial officer; and trespass will not lie against him, where his bailiff, by mistake, took the goods of B., under a precept commanding him to take in execution the goods of A.

1827.

Sittings at Westminster after Hilary Term, 1827.

Feb. 13th.

FRIEND v. HARRISON.

In an action on an annuity bond given by a man to a woman with whom he cohabits, the question for the consideration of the Jury is, Whether at the time when it was given there was or was not an intention and agreement to continue the connection in future. For if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover.

DEBT on a bond by which the defendant engaged to pay the plaintiff an annuity of 50*l.* a-year. The defendant pleaded *first, non est factum*; and *secondly*, that the said plaintiff ought not to have and maintain her action against him, because the said writing was executed and delivered by him the said defendant to the said plaintiff, in consideration of the said plaintiff's then and there agreeing with the said defendant unlawfully and immorally to cohabit and commit fornication with the said defendant, *after the execution* of the said writing.

The bond was dated the 6th of January, 1824, and it appeared that the plaintiff, who was a common prostitute at the time when the defendant first became acquainted with her, had cohabited with him for two years before the bond was given, and that she continued to cohabit with him till the end of February, 1824, when she went down to Folkstone, in Kent, and lived for three months with her friends. After this she came again to London, and renewed her connection with the defendant.

BEST, C. J.; in his summing up, said—It is important to the public that the principles should be well known upon which this case must be decided. If this defendant had seduced the plaintiff, and afterwards, wishing to discontinue his connection with her, and by way of atonement, and to keep her from the same way of life in future, gave her the bond in question, no person, in point of morality or of law, can have a stronger claim on the defendant's property than she has. But it is abundantly clear that there was nothing like seduction in this case. The defendant

found this woman a common prostitute. But if a man takes a prostitute, and cohabits with her, and afterwards, being desirous of putting an end to the connection, in order to prevent the woman from continuing in a course of prostitution, gives her an annuity bond, he will be answerable in an action upon it; therefore, if the defendant in this case acted with this intention, he is liable. But there is another view which may be taken of a case like this. Persons who connect themselves with women of this description often become extremely attached to them; and the women, aware of that, threaten to put an end to the connection, unless some permanent provision is made for them. If, therefore, the plaintiff obtained this bond from the defendant, intending at the same time to continue the connection, then I am of opinion that the special plea is proved. The learned Serjeant, for the plaintiff, says that you must be satisfied that there was an agreement when the bond was given to continue the connection: that is a matter of which you cannot have express evidence; but it may be made out from the other facts of the case. His Lordship then left it to the Jury, who found a

1827.
FRIEND
v.
HARRISON.

Verdict for the plaintiff.

Peake, Serjt., and *Hutchinson*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*Blacklow*, and *Roberts*.]

BUTLER v. TURLEY.

Feb. 13th.

FALSE imprisonment.—The defendant justified the imprisonment, on the ground that the plaintiff was offending

In an action for false imprisonment the defendant justified under the

1 Geo. 4, c. 58 (commonly called the petty trespass act), as the owner of land on which the plaintiff was trespassing. It was held that to make out his justification he must give positive *proof of actual damage being done*, so as to enable the Jury to decide on the quantum of it; and that the Jury were not to presume damage from the mere fact of a trespass being committed. *Semb.* that the principle of this decision will apply to the substituted provisions of the 7 & 8 Geo. 4, c. 30, the above act of 1 Geo. 4, having been wholly repealed by the 7 & 8 Geo. 4, c. 27.

1827.
 BUTLER
 v.
 TURLEY.

against the statute 1 Geo. 4, c. 56 (a), commonly called the Petty Trespass Act. The plaintiff's witnesses stated, that

(a) This stat. enacts, that "if any person or persons shall wilfully or maliciously do or commit any damage, injury or spoil, to or upon any building, fence, hedge, gate, stile, guide post, mile stone, tree, wood, underwood, orchard, garden, nursery ground, crops, vegetables, plants, land, or other matter or thing growing or being thereon, or to or upon real or personal property of any nature or kind soever, and shall be thereof convicted within four calendar months next after the committing of such injury, before any justice of the peace for the county, riding, division, city, town or place where such offence shall have been committed, either by the confession of the party offending, or by the oath of one or more credible witness or witnesses, or of the party aggrieved in the premises, which oath such justice is hereby empowered to administer, every person so offending, and being thereof convicted as aforesaid, shall forfeit and pay to the person or persons aggrieved, such a sum of money as shall appear to such justice to be a reasonable satisfaction and compensation for the damage or injury or spoil so committed, not exceeding in any case the sum of five pounds."

The 3d section enacts, "that it shall and may be lawful to and for any constable or other peace officer, and to and for the owner or owners of any property so damaged, injured or spoiled, and to and for his, her or their servant or ser-

vants, or other person or persons acting by or under his, her or their authority, and to and for such person or persons as he, she or they may call to his, her or their assistance, without any warrant or other authority than by this act, to seize, apprehend and detain any person or persons who shall have actually committed, or be in the act of committing, any offence or offences against any of the provisions of this act, and to take him, her or them before any justice of the peace for the county, city or place where the offence or offences shall be committed; and such justice is hereby empowered and required to proceed and act, with respect to such offender or offenders, in manner by this act directed."

This statute is wholly repealed by the stat. 7 & 8 Geo. 4, c. 27, and in lieu of its provisions, the 24th and 28th sections of the 7 & 8 Geo. 4, c. 30, entitled "An Act for consolidating and amending the laws in England, relative to malicious injuries to property," enact as follows:—
 "That if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a

on Sunday, the 5th of November, in the morning, the plaintiff and two others were walking in the Edgware Road, and turned into a field belonging to the defendant; that there was a board at the corner pointing out the footway to Willesden Green, and several other places; that they went along a path leading to some cottages into a second field, where they met the defendant; that there was an appearance of a continuation of the path, and an open gap in the hedge; that the defendant called to them, and told them that they were not in the right footpath; that they did not answer, but turned out of that path, and went into the path which they had left; that the defendant's servant came up and laid hold of the plaintiff, and said they had no business there, and should go back, for there was no

1837.
BUTLER
v.
TURLEY.

reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied; and if such sum of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar

months, unless such sum and costs be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game, but that every such trespass shall be punishable in the same manner as before the passing of this act."

Sect. 28.—"That any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

1827.
 BUTLER
 v.
 TURLEY.

path there; upon which the plaintiff said, that he considered he was in the right path, and would not go back; that they then got into a third field, where the defendant collared the plaintiff; that they then went out into the lane, and the defendant went before them and stopped them; that a person came up and said they were respectable tradesmen, and he would be answerable for their appearance; that the defendant then said he would have his revenge; that a constable was then sent for, and told to take charge of them: he said, he knew them all, and would be answerable for their appearance; but the defendant said, he would insist on their being locked up, and would abide by the consequences; that they were then locked up in the cage, and remained there till half past seven in the evening, when they were released by a magistrate residing in the neighbourhood. One of the plaintiff's companions stated, that while they were in the third field, he (the witness) told the defendant, that if they were in the wrong path, it was the board that misled them, and if they had done any damage they would pay him for it. The defendant replied, that they had not done him any damage, but that they had no business there. The defendant gave charge of them for a trespass.

A witness was called for the defendant, who stated, that the plaintiff's party were out of the foot-path in the defendant's field; that the defendant told them they should not walk there; but they broke through a hedge; and that they struck the defendant. The witness added, that there was not much grass, and that *he could not say that any damage was done.*

BEST, C. J., upon this, observed—I think there is an end of the justification. I think there must be some *damage*; and if you cannot prove it by witnesses, the case is not within the act of Parliament.

Cross, Serjt.—The witness cannot specify the particular blades of grass which were injured.

BEST, C. J. — That is not necessary. But an act of Parliament which puts the liberty of the subject in danger, ought to receive a strict construction; and I think it is not every walking over another man's land for recreation, if no damage is done, that constitutes a case within the meaning of this act. You must make out actual, positive damage: imaginary damage will not do. There is imaginary damage in every walking over grass land; and for this you may bring your action, if you are sufficiently ill-natured; but you cannot proceed under this act of Parliament. I do not think the party has committed an offence within the spirit of the act. It is improper and vexatious, in fields in the neighbourhood of a road, to be subject to this kind of conduct; but until it is proved that there has been actual damage, it is not within the act.

Cross, Serjt. — This is a case in which a party has notice, and is requested to depart. We should recover damages in an action of trespass.

BEST, C. J. — On the plaintiff's own evidence, I should say that he was a wilful trespasser; but it is not because a man is a wilful trespasser that another has a right to take him up, and keep him in custody from Sunday till Monday morning.

Cross, Serjt. — It is for the Jury, and not the witnesses, to estimate the quantum of damage.

BEST, C. J. — I shall tell the Jury, that this is a case in which they are not to presume damage, but must be quite satisfied that damage has actually been done, so as to be able to assess the quantum of it.

A second witness was then called for the defendant, who confirmed the statement of the first, and said, in addition, that the defendant several times asked the plaintiff's par-

1827.
BUTLER
v.
TURLEY.

1827.
 BUTLER
 v.
 TURLEY.

ty for their names, but they refused to give them. On his cross-examination, he said that people were in the habit of walking in the direction in which the plaintiff walked, and he had often sent them back; and that the plaintiff and his party said in the evening, that they were sorry for having trespassed, and would pay 5s. for the damage, and the trouble of taking them into custody. The witness added, that from the appearance of the fields, persons might suppose that there was a footpath in the direction spoken of, but that they could not suppose there was any right of way.

Vaughan, Serjt., in reply.—The act is only intended to apply to cases where the party designs to do an injury to the owner of the land, and goes for that purpose. There must be a premeditated design to do injury. The appearance of the path creates a special exception in favour of the plaintiff, under the words of the 6th section of the stat. 1 Geo. 4, c. 56 (a).

BEST, C. J.—The act was intended to enable the owners of land to recover compensation from persons doing ac-

(a) That section enacts, "that nothing in this act contained shall repeal or affect any act or acts now in force, whereby any person or persons may be subject to punishment for wilful and malicious acts of trespass to any property, either public or private, or shall extend to any case of wilful or malicious mischief or trespass to private property, in which the damage claimed shall exceed the sum of five pounds, or to any case wherein it shall appear to the satisfaction of the justice or justices before whom the complaint is made, that the party trespassing

acted under a fair and reasonable supposition that he had a right to do the act to the property in respect whereof the trespass was committed or alleged to have been committed, or to do or commit the act complained of; or shall have committed such trespass in hunting, or being a qualified person, and having duly obtained his certificate authorising him to kill game, shall have committed the injury complained of in the pursuit of any kind of game." For this sect. the proviso, *ante*, p. 587, n. is substituted.

tual damage to their property, and not in a situation to make it worth while to bring an action against them. If you think, on the evidence, that any actual damage was done, on any part of the defendant's premises, then you may find a verdict for him on the special plea. If the plaintiff mistook the track for a public footpath, then there will be an end of the justification, on the ground that the trespass was not malicious (a); but I think it is impossible to say that he mistook the gap in the hedge for a public way. His Lordship left the question to the Jury, who found a

Verdict for the plaintiff—Damages, 40s.

Vaughan and Wilde, Serjts., and Campbell, for the plaintiff.

Cross, Serjt., and E. Lawes, for the defendant.

[Attornies—*Carlon, and Wright.*]

(a) By the 25th sect. of the stat. 7 & 8 Geo. 4, c. 30, it is enacted, "that every punishment and forfeiture, by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment, or

upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."

HILTON v. GOODHIND.

Feb. 20th.

REPLEVIN.—Cognizance by the defendant as the bailiff of one Ward, under whom the cognizance averred that the plaintiff held premises *at a certain yearly rent, to wit, the rent of 170l.*

It appeared, that a written agreement had been entered into between the plaintiff and Ward, in which the rent was stated to be 170l.; but after that agreement was

shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; and therefore an allegation is correct which states it to be 170l.

If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170l. a-year, and afterwards an arrangement is made by parol that 30l. a-year

1827.
BUTLER
v.
TURLEY.

1827.
 HILTON
 v.
 GOODHIND.

signed, it was arranged by parol that the sum of 30*l.* a-year should be allowed out of it, because the landlord, Ward, was to occupy a part of the premises by his horses for a time. The horses were still there; and a witness proved, that the plaintiff said, that he would not have that part of the premises at all.

Taddy, Serjt., submitted, that, according to the evidence, the real rent payable by the plaintiff to Ward was 140*l.* only, and therefore, that the cognizance, which stated it to be 170*l.* was not proved. He said, that about five years ago a similar objection was allowed in a case on the Home Circuit, which was tried by Baron *Graham*.

BEST, C. J.—The plaintiff is tenant of the whole to Ward, and permits Ward to occupy a part, that is, at the utmost, a tenancy at will; and the plaintiff may have it determined at his pleasure. It is a letting of the whole, with a sub-letting of a part, or rather a licence to use it. The verdict must be for the defendant.

Verdict for the defendant.

Taddy, Serjt., and ——— for the plaintiff.

Vaughan, Serjt., and *Abraham*, for the defendant.

[Attornies—*Hallett*, and *Pittman*.]

Adjourned Sittings at Guildhall, after Hilary Term, 1827.

Feb. 22nd.

STERRY v. FOREMAN.

An allegation
 in a declaration
 in slander,
 which states,

that "by reason of the premises, divers persons, to wit," &c., "who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do," is not supported by evidence which shows that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation.

SLANDER for words spoken, on the Royal Exchange, of the defendant, whose business was that of a master or

captain in the merchant service. The declaration averred, that by reason of the premises, divers persons [naming them] who would otherwise have *retained and employed* the plaintiff as master, for a reward to be paid to him, wholly *declined and refused* so to do.

Two witnesses were called, who stated that they would have recommended the plaintiff to the employment of the persons named in the declaration; and those persons proved, that on such recommendation they would have employed him.

This was the only evidence given in support of the allegation.

Spankie, Serjt. objected, that the special damage was not proved as laid, because the persons alluded to did not *refuse to employ*. It is true they did not employ; but that was not on account of the slander, but on the ground of the non-recommendation.

BEST, C. J., allowed the objection.

Wilde, Serjt., and *Platt*, for the plaintiff.

Spankie, Serjt. for the defendant.

[Attornies—*Drew*, and *Lowless & B.*]

DOE on the demise of PALMER v. ANDREWES.

Feb. 22d.

EJECTMENT.—The defendant was tenant to the lessor of the plaintiff of part of a house in Birchin-lane, and paid rent to him up to Christmas, 1824. A tenant of another part of the same house proved that, in 1825, a distress was put into the house by the superior landlord, and that the defendant paid 15*l.* 15*s.*, for his proportion up to Lady-day, 1825. On the 22d of January, 1825, the interest of the lessor of the plaintiff in the premises was assigned under the Insolvent Debtor's Act, to the provisi-

The interest of an insolvent debtor in premises held by him from year to year, under an agreement for a lease, passes by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment

against his tenant with respect to the same, notwithstanding no act has been done by such provisional assignee, to shew his acceptance or his refusal of the lease.

1827.
 DOB d.
 PALMER
 v.
 ANDREWES.

onal assignee of that court. It did not appear that there had been any assignment by the provisional assignee to any other person.

Spankie, Serjt., for the defendant.—The defendant was compelled to make the payment up to Lady-day, 1825, to relieve his goods from the distress put in by the superior landlord. That payment was not a payment to Palmer. The defendant has not paid rent to Palmer since he became insolvent, at which time his legal interest in the premises was transferred by assignment to the provisional assignee under the Insolvent Debtor's Acts. The case of *Crofts v. Peck* is an authority to shew that the provisional assignee has no discretion to reject. The provisions of the act vest the property in the provisional assignee, and it remains in him.

BEST, C. J., mentioned the case of *Lindsay v. Limbert* (a), decided last Term.

Spankie, Serjt.—The property is divested from the original holder, and transferred to the provisional assignee for the benefit of the creditors. The assignee is at liberty, within a reasonable time, to reject the lease. This was the case in *Lindsay v. Limbert*. The provisional assignee has not rejected in this case, and therefore the interest is out of Palmer. In *Lindsay v. Limbert*, the only question was, whether the assignee should be liable to a burdensome consequence, and not whether the insolvent continued to have the property. The action of ejectment is founded on the legal title, and that Palmer has not got.—The circumstance of contingent liability on the covenants, which are a personal contract, makes no difference. The notice to quit also, must be given by a person having the legal estate, otherwise it is of no avail, and does not make

(a) *Ante*, p. 526.

the defendant a trespasser. The case of *Doe v. Spencer* (a) is in point in the defendant's favour.

1827.

DOE d.
PALMERv.
ANDREWS.

BEST, C. J., inquired if the provisional assignee had taken possession of the premises; and being answered in the negative, his Lordship said,—I consider that this case was in principle decided last Term.—No property passes to the assignee, either in bankruptcy or insolvency, unless he agrees to accept it. It is clear that this property was rejected, as there has not been any subsequent assignment. I am clearly of opinion, that the lessor of the plaintiff is entitled to a verdict.

Verdict accordingly.

Lawes, Serjt., and *E. Lawes*, for the plaintiff.

Spankie, Serjt., and *Abraham*, for the defendant.

[Attornies—*Croft & J.*, and *Andrews*.]

IN the ensuing Easter Term, *Spankie*, Serjt., obtained a rule *nisi* for a new trial, which after argument was made absolute; the Court being of opinion that the property passed to the provisional assignee by virtue of the assignment under the statute, although no act had been done by such provisional assignee to shew his acceptance of it.

(a) *Ante*, p. 79.

HOGARTH and Others v. JACKSON and Others.

March 1st.

THE declaration charged the defendants with having interrupted the plaintiffs in killing a whale. There was also a count in trover for a whale.

The plaintiffs were the owners of a ship, called the Old Middleton, and the defendants the owners of another ship

the line round it, &c.), to the boat of the first striker, *though the harpoon does not continue in the body of the fish*—and this is a more reasonable usage than that mentioned in a note to the case of *Fennings v. Lord Grenville*, in 1 Taunt. p. 248.

By the usage of the whale fishery, a fish is to be considered as a *fast* fish, which is attached by any means (such as the entanglement of

1827.
HOGARTH
v.
JACKSON.

called the *Andrew Marvel*, both of them engaged in the whale fishery. The plaintiffs' crew had struck a whale, which was shortly after struck by the defendants' crew, and the question was, whether, at the time when the defendants' crew struck, the whale was what is called in the trade a fast or a loose fish.

The custom of the fishery as relied on by the defendants was that which was mentioned in a note to the case of *Fennings v. Lord Grenville* (a), viz. that "*while the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker the whale is a fast fish, and though during that time struck by a harpoon of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second; the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.*"

But the witnesses for the plaintiff proved it to be the uniform usage, that, *whether the harpoon continues in the body or not*, if the fish is attached by any means, such as the entanglement of the line, or other cause, to the boat of the party first striking it, so that such party may be said to have the power over it, it is considered as a fast fish, and cannot be taken by any other vessel.

BEST, C. J., in summing up, said—The custom mentioned in the case in *Taunton* differs from this, but I think this is the more reasonable custom, as, the fish being in the water, it is not easy to discover whether the harpoon is in its body or not.

The Jury, upon the facts, found that the fish was a fast fish, and gave a verdict for the plaintiffs.

(a) 1 Taunt. 243.

Wilde and *Spankie*, Serjts., and *Chitty*, for the plaintiffs.

Taddy, Serjt., *Brougham*, and *Alderson*, for the defendants.

[Attornies—*Blunt* & Co., and *J. E. Alderson*.]

1827.

HOGARTH
v.
JACKSON.

BANKS v. KAIN.

March 3rd.

TROVER for a table cover, and thirty-six chairs.—The plaintiff was the master of the ship *Haydon*, of which the defendant had a mortgage, under which he had taken possession of the ship, and the chairs, &c., in question, which were in the cabin; and the dispute was, whether he had a right to retain them as belonging to the ship, or the plaintiff to recover them as his private property. For the plaintiff, the person of whom he bought the chairs was called as a witness. He stated, that they were sold on the understanding, that if they were not paid for, they were to be returned, and that he had not been paid.

In an action of trover for goods, the party who sold them to the plaintiff, on an understanding that if they were not paid for they were to be returned, is a competent witness for the plaintiff, although he has not been paid, and the plaintiff's succeeding in the action will enable him to have them back.

Wilde, Serjt., upon this objected, that the witness was interested, because, if the plaintiff recovered, he (the witness) could have the chairs back.

Taddy, Serjt., replied that the witness stood indifferent between the two parties, for if the goods were not returned he would be entitled to the price of them.

Wilde, Serjt., observed, that there was a great difference between having the right to take the article itself, and being obliged to sue a man to obtain the price of it.

BEST, C. J.—I think the witness is competent. It seems to me that he stands indifferent between the parties.

Verdict for the plaintiff.

Taddy, Serjt., and *Steer*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Cox*, and *D. H. Williams*.]

1827.

COURT OF KING'S BENCH.

Second Sitzings at Westminster, in Easter Term, 1827.

BEFORE LORD TENTERDEN, C. J.

May 21st.

UPSTON v. SLARK.

Evidence that at the door of a booking office, there is a board on which is painted, "conveyances to all parts of the world," and a list of names of places, is not sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there.

CASE against the defendant as a common carrier, for the loss of a box. There was also a count in trover. Plea.—Not Guilty.

It appeared that the defendant kept a booking office in Piccadilly, at which parcels were booked for a considerable number of coaches and waggons, and that in October, 1826, the box in question was booked there, to go by the Windsor waggon. It was proved, that the defendant's name was painted over the door of the office, and that on a board at the side of the door was painted the words, "conveyances to all parts of the world," and this was followed by a list of names of places including Windsor. The box was never received at the place to which it was addressed.

LORD TENTERDEN, C. J.—There is no proof that the defendant is a carrier; the plaintiff has declared against him as a carrier.

Scarlett, A. G. for the plaintiff.—The defendant opens his office to receive parcels as a carrier, and we know no other.

Archbold, on the same side.—Does not your Lordship think, that by opening an office of this sort, and painting up a list of places that goods will be conveyed to, he holds himself out as a carrier?

LORD TENTERDEN, C. J.—We know that there are in this town, booking offices that do not belong to the carriers; and I am clearly of opinion that you cannot convert the keeper of a booking office into a carrier (a).

1827.
UPSTON
v.
SLARK,

The plaintiff's counsel wished to go on the count in trover (b); but it being proved on the part of the defendant, that his porter delivered the box in due course to a person named Hunt, who was a Windsor carrier, the plaintiff was

Nonsuited.

Scarlett, A. G., and Archbold, for the plaintiff.

Gurney, for the defendant.

[Attornies—*Upston, and Robinson.*]

(a) See *Newborn v. Just, ante, 76.*

(b) See the notes to the case of *Griffiths v. Lee, ante, Vol. I. 110, n.*

Sittings at Westminster, after Easter Term, 1827.

WINKFIELD and Another, Assignees of ROBINSON, a Bankrupt, v. PACKINGTON, Bart.

May 29th.

ASSUMPSIT for work and labour. Plea—General issue.

It appeared that Robinson the bankrupt had been a carrier by barges on the canals from London to Worcestershire, and that he had carried a quantity of trees for Sir John Packington, from Hammersmith to Hanbury wharf,

If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk who is transact-

ing the business there, 2s. 6d. per cwt., and on the faith of this he sends the goods, the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates in which 3s. 6d. per cwt. was set down for goods of the sort in question.

1827.
WINKFIELD
v.
PACKINGTON.

in the county of Worcester. It was proved that the regular price of the carriage would be 70s. per ton, and that the order given by Robinson to his clerks was to charge goods carried according to a printed book of rates, in which 70s. a ton was the price specified for trees.

The defence was this: That before the trees were sent, a person named Lee (at the desire of the defendant) called at Robinson's wharf, at Hammersmith, and asked at how much *per* ton, trees would be carried to Hanbury wharf, and that the clerk who was in the office there replied, half a crown *per* cwt. (which amount had been paid into court).

Lord TENTERDEN, C. J.—If a person goes to the office of a carrier, and asks what a thing will be done for, and he is told by a clerk or servant who is transacting the business there, that it will be done for a certain sum, the master can charge no more.

Denman, C. S.—I submit, that, it being contrary to his orders, the clerk had no right to agree that the trees should be carried at a rate lower than that expressed in the book.

Lord TENTERDEN, C. J.—The only question is, whether the account given by the defendant's witness, that the clerk of the bankrupt said that the trees would be carried for half a crown a hundred, is correct. It is said that this person had no authority to make such a bargain; however, I am of opinion that it signifies nothing in this case, whether the bankrupt's servant did his duty, or made a mistake. For if the trees were sent on the faith that they would be taken at a given price, in consequence of what the clerk said, it is quite clear, that the plaintiffs can recover no more.

Verdict for the defendant.

Lord TENTERDEN, C. J.—If men were not bound by such bargains as this, business could not go on.

Denman, C. S., and Chitty, for the plaintiffs.

Taunton and Russell, for the defendant.

[Attornies—Amory & Coles, and T. White.]

1827.

WINKFIELD

v.

PACKINGTON.

Sittings in London after Easter Term, 1827.

ROGERS v. HUNTER.

May 30th.

ASSUMPSIT for demurrage. Plea—General Issue.

It appeared that the ship *Thirza* sailed as a general ship from Bremen to London; and that the defendant had shipped a quantity of oats and beans on board her. The bill of lading was put in, and at the bottom of it was written “to be discharged within twelve *running days* after the vessel’s arrival, or to pay 2*l.*, British sterling, demurrage, for every day longer detention.”

It was proved that the ship arrived in the river Thames on the 11th of December, 1826, and was reported on the 12th, and therefore, as the plaintiff contended, the twelve running days commenced on the 13th, and ended on the 28th of that month; however, in point of fact, the corn was not all landed till the 2d of January, 1827.

Marryat for the defendant.—We are in a condition to shew that from our goods being under those of other persons, who had also goods on board, we could not get at them so as to discharge them, till the 26th of December; and I submit that the number of days for discharging does not begin to run till we are enabled to get at our goods.

This was proved; but the witnesses admitted that the corn might have all been landed in a smaller number of days.

If a freighter is to discharge *within twelve running days* after the vessel’s arrival; and he is prevented from discharging at first by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging.

1827.
 ROGERS
 v.
 HUNTER.

LORD TENTERDEN, C. J.—It seems to me that the defendant cannot be said to detain the vessel, before he can get at his goods; but when he can, he is bound to use all reasonable diligence. I do not think that the defendant is, at all events, entitled to the same number of days, after the goods can be got at, as is specified in the contract; and the question will be, whether, adverting to all the circumstances, the defendant ought to have taken the goods out of the ship in a smaller number of days than he did.

Verdict for the plaintiff.—Damages 8*l.*, being for four days' demurrage.

Scarlett, A. G., and Platt, for the plaintiff.

Marryat, for the defendant.

[Attornies.—*Warne & Son*, and *B. Lewis*.]

May 29th.

DOD v. EDWARDS.

If the drawer of a bill payable to his own order, before it is indorsed, give the acceptor a general release; this is no defence to an action by an indorsee against the acceptor, unless there be proof that the indorsee knew of the release.

ASSUMPSIT on a bill of exchange, dated September, 13, 1826, payable three months after date, for 96*l.* 11*s.* 7*d.* drawn by a person named Hobson, and accepted by the defendant, payable to the drawer's order, and by him indorsed to the plaintiff.

The plaintiff rested on the formal proofs.

Brougham for the defendant.—I am in a condition to shew that the bill was indorsed on the 21st of November, and that, on the 4th of October, the drawer put it out of his power to indorse, by giving a general release to the defendant.

LORD TENTERDEN, C. J.—You must shew that the plaintiff knew it. If you cannot shew that the plaintiff was aware of the release, your defence fails; if it were not so, you would put an end to the circulation of bills.

Brougham.—The party, by the release, puts all right out of himself.

1827.
 }
 Dod
 v.
 EDWARDS.

LORD TENTERDEN, C. J.—It is quite clear that you must trace it to the plaintiff's knowledge.

Verdict for the plaintiff.

Scarlett, A. G. and Hutchinson, for the plaintiff.

Brougham, for the defendant.

[Attornies—*Reeves*, and *Cornthwaite*.]

REX v. RAMSDEN and Others.

June 2d.

INDICTMENT for a conspiracy to sue out a fraudulent commission of bankrupt against two of the defendants.

The petitioning creditor, who was called on the part of the prosecution, stated, that he bought the debt upon which he became petitioning creditor six months ago.

In his cross-examination, *F. Pollock*, for the defendant Ramsden, put a paper into his hand, which he acknowledged to be of his handwriting, and then asked him if he had not bought the debt nine months before; which he admitted he had.

Scarlett, A. G., for the prosecution, wished to look at the paper.

F. Pollock.—I submit that my friend has no right to see it, unless he will read it in evidence.

LORD TENTERDEN, C. J.—You put the paper into the witness's hands to refresh his memory. It is very usual for the opposite counsel to see it, and examine upon it, and I think he has a right to see it.

If the counsel for the defendant, in cross-examination, put a paper into the witness's hand, to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence. And the opposite counsel may also ask the witness when it was written, without being bound to put it in.

1827.
 Rex
 v.
 RAMSDEN.

Scarlett, A. G.—Having looked at the paper, asked the witness if he would swear that it was written at the time it bore date.

F. Pollock.—I submit that this question cannot be asked without the paper being read.

Lord TENTERDEN, C. J.—I think it may. You put the paper into the witness's hand, and I think the other side may ask when it was written, without being bound to read it.

The Jury found the defendants Ramsden and Clark guilty, and the defendant Cooke not guilty.

Scarlett, A. G., Gurney, Montague and Busby, for the prosecution.

Denman, C. S., F. Pollock, Brougham, Hutchinson, and D. F. Jones, for the respective defendants.

[Attornies—*Hughes*, for the prosecution; and *Humphries and Isaac*, for the respective defendants.]

In *Hardy's* case, 24 How. Stat. Trials, 824, *Eyre, C. J.* said, "It is always usual and very reasonable, when a witness speaks from memorandums, that the counsel should have an opportunity of looking at those memorandums, when he is cross-examin-

ing that witness. If there is any thing that you (the witness) say, upon your oath, does not relate to that subject, but to some other subject, to be sure it is impossible to be asked that that should be seen."

1827.

*Adjourned Sittings at Westminster, after Easter
Term, 1827.*

SMALL v. GRAY.

June 9th.

CASE.—The first count of the declaration was, for a malicious arrest. The second count stated—that heretofore, &c., the defendant not having any reasonable or probable cause of action against the plaintiff, for the amount of the sum of money for which he caused the plaintiff to be held to bail, as thereafter mentioned: but contriving &c., maliciously &c., caused and procured &c., a certain writ, &c., to be sued out marked for bail for 30*l*. “And the same writ being so, marked and indorsed for bail as aforesaid, the said John afterwards, and before the said return hereof, to wit, on the same day and year last aforesaid, at Westminster aforesaid, in the county of Middlesex aforesaid, contriving and intending as last aforesaid, and without having any reasonable or probable cause of action whatsoever against the said Samuel, to the amount of 10*l*. or upwards, *falsely and maliciously caused the said Samuel to be held to bail*, under and by virtue of the said last mentioned writ, for the said last mentioned sum of 30*l*., and thereupon the said Samuel was then and there *forced and obliged to, and did procure certain persons to become bail* for the appearance of him, the said Samuel, in the said Court, to answer the said John according to the exigency of the said last mentioned writ upon that occasion—whereas in truth and in fact he the said John, at the time of suing forth the said last mentioned writ, and of the said holding of the said Samuel to bail, had not any reasonable or probable cause of action against the said Samuel, to the amount of,” &c. (it then stated the termination of the suit); by means whereof, &c. Plea—Not guilty.

An action lies for maliciously holding a party to bail, although he is never arrested, but is told that there is a writ out against him, and he goes to the sheriff's officer and gives bail.

It appeared that the writ was sued out, marked for bail as stated in the declaration, and that a person named

1827.

SMALL

v.
GRAY.

Russell went to the plaintiff, and told him that there was a writ out against him, and that he must give bail to it, which he accordingly did; and evidence was gone into to shew a want of probable cause.

Marryat, for the defendant.—I submit that the plaintiff must be called. There was no arrest to support the first count of the declaration, and as to the second, there was nothing to compel the plaintiff to give bail; as the only thing which can *compel* a man to give bail is an arrest, which there was not in this case.

Lord TENTERDEN, C. J., (stopping *Scarlett*,² A. G. and *Campbell*.)—I am clearly of opinion, on this evidence, that the case must proceed on the second count.

Marryat then addressed the Jury, and went into a detail of facts to shew that there was probable cause for the arrest: but his Lordship having looked at his notes of the trial of the case, in which the supposed malicious arrest occurred, said, that there would no doubt be much conflicting evidence on that point, and recommended that a Juror should be withdrawn. This was acceded to.

Scarlett, A. G., and *Campbell*, for the plaintiff.

Marryat, for the defendant.

[Attornies—*Carlton*, and *Younger*.]

See the case of *Berry v. Adamson*, ante, p. 503.

June 9th.

THOMAS v. NEWTON.

In an action by
the indorsee
against the ac-
ceptor of a bill

of exchange, if the defendant shew that there was originally no consideration for the bill; it then lies on the other party to shew that he or some previous indorsee gave value for it.

ASSUMPSIT on a bill of exchange, drawn by a person named Wilson on and accepted by the defendant and in-

dorsed to a person named Dandridge, and by him indorsed to the plaintiff. The plaintiff rested on the formal proofs.

The defence opened was, that the bill was accepted for stock-jobbing differences; and Wilson the drawer was called to prove this: but he declining to answer, as he might subject himself to penalties, it stood on the evidence that there was no valuable consideration for the bill.

1827.
THOMAS
v.
NEWTON.

LORD TENTERDEN, C. J.—If the defendant shews that there was originally no consideration for the bill, that throws it on the plaintiff to shew that he gave value for it, or that value was given for it by Dandridge: for if either the plaintiff or Dandridge gave value for it, the plaintiff may recover; otherwise the defendant is entitled to a verdict.

Verdict for the defendant.

Marryat and Chitty, for the plaintiff.

Gurney, for the defendant.

[Attornies—*Harvey & Co.*, and *Isaacs*.]

COURT OF COMMON PLEAS.

Adjourned Sitzings at Westminster, after Easter Term, 1827.

BEFORE LORD CHIEF JUSTICE BEST.

BEESTON v. COLLYER.

June 1st.

ASSUMPSIT for wages as a clerk.—The defendant was an army agent. The claim was for 83*l.*, being a balance, at the rate of 500*l.* a-year. An entry was read from the

The law founded upon usage, which justifies the discharge of domestic servants on giving

a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of 500*l.* a-year.

1827.

*First Sitzings at Westminster, in Trinity Term,
1827.*

June 20th.

GRADDON v. PRICE.

A performer, who is called on to resume, in consequence of the illness of another, a part in which by previous performances she has acquired celebrity, is entitled to reasonable notice previous to the time of performance, such notice to be proportioned to the reputation at stake.

ASSUMPSIT by Miss Graddon the singer, against Mr. Price, the lessee of Drury Lane Theatre, to recover a balance of salary. All that was due had been paid, with the exception of a sum of 20*l.* which, it was contended by Mr. Price, he had a right to detain for a fine incurred by Miss G., under the following circumstances: It appeared that Mrs. Geesin who was advertised to play the part of Catherine, in the Siege of Belgrade, on a particular night, was, the day before, taken so ill, as to render it impossible for her to appear according to her engagement: Miss Graddon, who some time before had been in the habit of playing the part, was, in consequence, sent for by Mr. Wallack, the stage manager, and informed that she would be required to undertake the part. She remained at the theatre, and went through part of the rehearsal, and then asked permission to go home, that she might read over the part, as it was some time since she had played it before. This was assented to by Mr. Wallack, and her name was advertised in the next day's bills, to appear in the evening. About 2 o'clock, after the bills were printed, she sent a message to the theatre, stating, that she would not play, and in consequence, an apology was made for her non-appearance, and the part was performed by Miss Tree. That part of the rules and regulations of the theatre, on which the defendant relied, was as follows:—"Any one refusing to study, rehearse or perform at the appointment of the manager, shall forfeit 30*l.*" It appeared that 10*l.* of this fine had been remitted.

Wilde, Serjt. for the plaintiff.—The plaintiff had ac-

quired a certain celebrity by her previous performance of the part in question, and required more time to recover it, in order to keep up her reputation, upon which her fortune depended. With respect to Miss Tree, who, it seems, undertook the character, she had not acted it before, and therefore had no reputation to lose. Have managers a right to exercise such control over the reputation of actors, as to ruin them by requiring them to act at too short a notice? I submit with confidence, that a performer is entitled to reasonable notice, in a case like the present, and that such notice must be proportioned to the reputation at stake. Failure, on the particular night, would not end with that night, but would be prejudicial beyond it. Under the circumstances of this case, I contend, that the notice given was not reasonable notice.

1827.
GRADDON
v.
PRICE.

BEST, C. J.—The services of the plaintiff in this case are admitted; and it is admitted also, that they are worth 10*l.* a week, and that 20*l.* is due to her, unless it has been properly deducted for a fine. I think that the proprietors of a theatre are perfectly right in having regulations, and enforcing them by the payment of fines. It is a duty which they owe to themselves and the public, for if performers should refuse to appear on the night for which they were advertized, the property in the house would be in danger of being injured by the audience; and I am sure that performers will find it their interest to submit to these fines, if they do not appear when the public have a right to expect them. I agree with my brother *Wilde* that the regulation relied on in this case must have a qualification. The jurisdiction of a manager is a very arbitrary one, but in this kingdom all arbitrary jurisdictions have a limitation. I allow that in this case there must be reasonable notice. It is said, that the plaintiff had sufficient notice for a person who had acted the same character before; and if you think it was so, that will get over the difficulty. But if you think she had not sufficient notice, for a performer

1827.
GRADDON
v.
PRICE.

is not to destroy her reputation by taking a part in haste, then undoubtedly the defendant had no right to claim this fine, and the plaintiff will be entitled to a verdict for the amount.

Verdict for the plaintiff—Damages, 20*l*.

Wilde, Serjt., and *Hutchinson*, for the plaintiff.

Adams, Serjt., and *E. Lawes*, for the defendant.

[Attornies—*Righty*, and *Rice & R.*]

OXFORD SPRING CIRCUIT.

1827.

BEFORE MR. BARON GARROW & MR. BARON VAUGHAN.

BERKSHIRE ASSIZES.

BUTLER *v.* BASING.

March 2d.

ASSUMPSIT against the defendant as proprietor of a stage waggon going from Reading to London, for the loss of a box.

It appeared that the plaintiff had been hired as a servant at the Star and Garter inn, at Windsor, and that the box in question was sent by the defendant's waggon, to be left at the Black Boy public-house at Colnbrook. However, the plaintiff's brother, who carried the box to the Horse and Jockey inn, at Reading, from which the waggon started, did not take it to the booking-office there, but gave it to the defendant's waggoner. The non-arrival of the box was proved, but no evidence was given of the particular articles which it contained.

The defence, which was proved by the evidence of the waggoner, was, that this box was not sent by the waggon in the proper and ordinary course of business, but given to the waggoner for him to take, for his own gain, and not for the profit of his master the defendant.

If a parcel be given to a waggoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost. If a box of clothes, packed by the party's own hand, be sent by a carrier, and lost, the judge will recommend the Jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved.

GARROW, B., (in summing up to the Jury).—There is no doubt that by law every proprietor of a stage waggon is liable for all risks, except those occasioned by God and

1827.
 BUTLER
 v.
 BASING.

the king's enemies; and to make such proprietors answerable, it is not necessary that you should call up Mr. Pickford or any of the other persons who are the owners of these vehicles, and deliver your parcel to them; but a delivery of the parcel to any of the meanest of their servants is quite sufficient, provided that servant, in receiving parcels, be acting by the authority or with the assent of his master. But it is equally clear, that if persons be foolish enough to send parcels by the waggoner, for a hire paid to him which is never intended to find its way into the pocket of the owner of the waggon, then the owner is not liable in case the parcel is lost; and the first question in this case, therefore, is, whether in receiving this box the defendant's waggoner was, as his servant, authorised by him to receive parcels to be carried by this waggon. With regard to the amount of the damages in case a verdict passes for the plaintiff, it is right that I should tell you that here is no distinct evidence of the contents of the box; however, I should recommend you not to pare down the amount of the damages, because the articles contained in it cannot be distinctly proved. It very often happens that persons, more especially those in the station of life in which the plaintiff is, pack their own clothes, and in such cases it must be always impossible to give evidence of the precise contents of their boxes or portmanteaus. I should therefore recommend you, if you find for the plaintiff, to give damages proportioned to the value of the articles which you in your judgment think the box might and did fairly contain (a). However, the great question

(a) In the case of *Armory v. Delamirie*, 1 Str. 505, the plaintiff, a chimney-sweeper's boy, having found a jewel, took it to the defendant, a goldsmith, to know what it was. The defendant knocked out the stones, and returned the plaintiff the setting, refusing to give him back the stones. In

trover for the value of the stones, Pratt, C. J. directed the Jury, that unless the defendant would produce the stones, so as to shew that they were not of the finest water, they ought to presume against him, and make the value of the best jewels that would fit that setting the measure of their damages.

is, whether this contract to carry the box was made by the authorised agent of the defendant, or whether it was a private bargain made with the waggoner for his own gain, and distinct from his master.

1827.
BUTLER
v.
BASING.

Verdict for the defendant.

Curwood and Talfourd, for the plaintiff.

Shepherd, for the defendant.

[Attornies—*Vowles*, and *Graham*.]

DODWELL v. GIBBS, Gent., One, &c.

March 3rd.

TRESPASS for mesne profits. Plea—General Issue.

An examined copy of the judgment in ejectment was put in. The demise was laid in 1824; but it appeared that the declaration in ejectment was not served till Michaelmas Term, 1825.

Curwood, for the defendant, objected, that upon this evidence mesne profits could be recovered only from Michaelmas Term, 1825. For although the plaintiff's title to recover could not be controverted, yet the defendant, by the consent rule, only admitted himself in possession from the time of the service of the declaration in ejectment; and although the plaintiff might have an antecedent right to the premises in question, yet it did not follow that the defendant was in possession at an earlier period; and therefore, to entitle the plaintiff to recover mesne profits antecedent to the service of the declaration in ejectment, distinct evidence must be given that the defendant was in possession before that time.

In an action for mesne profits, the judgment in ejectment is conclusive of the plaintiff's right to the premises, from the day of the demise laid in the declaration in ejectment, but is no proof of the defendant's possession at that time. The consent rule admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intends to go for mesne profits antecedent to that time, he must give distinct evidence of the defendant's possession.

Jervis, contra, insisted that the judgment in ejectment was conclusive of the plaintiff's title to recover mesne pro-

1827.
 DODWELL
 v.
 GIBBS.

fits from the day of the demise laid in the declaration, and cited *Aslin v. Parkin* (a).

Curwood, in reply.—It is true that the judgment in ejectment is conclusive of the plaintiff's title to *recover* mesne profits from the day of the demise; but it is not conclusive of his right to recover the whole amount *against the defendant*. In the case of *Aslin v. Parkin*, Lord *Mansfield* says (b), that the judgment in ejectment is no evidence of *how long* the defendant has occupied, but that that fact must be proved by other evidence.

GARROW, B.—I am of opinion that the plaintiff can, on this evidence, only recover from the time of the service of the declaration in ejectment.

Verdict for the plaintiff.—Damages from the time of the service of the declaration in ejectment.

Jervis and Talfourd, for the plaintiff.

Curwood and Russell, for the defendant.

[Attornies—*Ward*, and *Gibbs*.]

(a) 2 Burr. 665.

(b) *Id.* 668.

March 3rd.

HEALEY v. JACOBS.

What is said by a third party at the time of the signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present.

ASSUMPSIT by the plaintiff as payee, against the defendant as the maker of a promissory note for 34*l.* dated on the 24th of October, 1825, and payable six months after date. The plaintiff relied on the formal proofs.

The defence opened was, that the defendant, who had failed in business, had made a composition with his creditors; and that a person named Plumridge, being a creditor, would not sign the deed of composition, unless this note was given to the plaintiff, to whom Plumridge owed money:

and that this was stated at the time of the signing of the note.

To prove this, a witness was called, who was present when the note was signed. He stated, that the plaintiff was not present, but the defendant's counsel wished to get from him, that at the time of the signing of the note, Plumridge said that he would not execute the composition deed, unless this note was given to Mr. Healey.

1827.
HEALEY
v.
JACOBS.

Peake, Serjt., objected that what Plumridge said, was not admissible in evidence to prejudice the plaintiff, unless he were present.

Curwood and *Carrington*, *contra*.—The plaintiff is one of the original parties to the note, and therefore, as against him, what passed at the time of the making of the note is evidence.

GARROW, B.—This evidence, if admissible, would be of the most dangerous description. The defendant is making a note payable to the plaintiff, at a time when the plaintiff is not present. Now I am asked to receive evidence of a conversation between the defendant and a third person, the plaintiff not being present. I am clearly of opinion that I cannot, and ought not to do so. What would be so easy as for a man, when he signed a promissory note, either to say, or to get somebody else to say, in the absence of the payee, that it was given without a consideration, or for an illegal consideration. It would be very hard if the payee were bound by that. The evidence is inadmissible.

Verdict for the plaintiff.—Damages, 34*l.* 14*s.*

Peake, Serjt., and *Cross*, for the plaintiff.

Curwood, and *Carrington*, for the defendant.

[Attornies—*Smith*, and *E. Isaacs*.]

1827,
 HEALEY
 v.
 JACOBS.

COURT OF KING'S BENCH.

BEFORE LORD TENTERDEN, C. J., BAYLEY, HOLROYD, &
 LITTLEDALE, JS.—In Bank.

May 7th.

Curwood now moved for a rule to shew cause why there should not be a new trial, on the ground that the evidence had been improperly rejected.

BAYLEY, J.—If it had been admitted, you would have given a declaration of Plumridge, not upon oath, in evidence against the plaintiff. If you had wanted to shew that the note was given, because Plumridge would not execute the deed without it, you could have called him as a witness to prove that fact.

LORD TENTERDEN, C. J.—We are of opinion, that the evidence was not admissible.

Rule refused.

OXFORD, ASSIZES.

BEFORE MR. BARON VAUGHAN.

March 7th.

WELLER v. DEAKINS.

If to qualify a horse to start for a certain stake, it should have been regularly hunted with the hounds of A. B. It is not necessary that the horse should have been hunted every day the hounds went out; but once hunting with those hounds is not sufficient.

MONEY had and received.—The defendant was the clerk of the course at the Mostyn-hunt Races; and the plaintiff sued him as a stake-holder, for the amount of stakes held by him on a race won by a mare of the plaintiff's called Funny.

If a race be advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions, without the consent of the whole of the subscribers. If the plaintiff's horse was disqualified, as not coming within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, and was guilty of a misrepresentation.

The printed proposal of the race which had been advertised, was in the following terms:—

1827.
WELLER
v.
DEAKINS.

“ A sweepstakes of ten guineas each, five forfeit, for horses not thorough bred *that have never started against a thorough bred one*, or *run for a plate*: that have been *regularly* hunted with Sir Thomas Mostyn's, the Duke of Beaufort's or the Duke of Grafton's hounds, up to the day of naming, and are *bond fide* the property of the subscriber. The winner of any race to carry 7lb. extra; 4-year olds, 11st. 5lb.; 5-year olds, 11st. 12lb.; 6-year old and aged, 12st. 2lb.; to be ridden by gentlemen twice round the course.—One guinea entrance. Horses to be named to Mr. E. Deakins on or before the 22d of March.”

It was proved that the plaintiff paid his share of the stake, and that his mare came in first; but it appeared, that the mare had been only once hunted with the hounds of Sir Thomas Mostyn.

VAUGHAN, B.—I apprehend that it cannot be necessary to qualify a horse to run for this stake, that he should have hunted *every* day the hounds went out. I think it would be sufficient to shew that the horse hunted frequently: but I am decidedly of opinion, that once hunting is not enough.

A witness proved, that about half an hour before the race was run, the plaintiff said to the defendant, that he hoped he was satisfied about the mare's hunting; and that the defendant replied, “ Quite so; you run your mare, we have arranged that.”

VAUGHAN, B.—It must be shewn that the clerk of the course had authority from the other subscribers to waive the conditions of the race. It is not enough for the clerk of the course to say, half an hour before the running, that

1827.
WELLER
v.
DEAKINS.

he would waive a particular condition; take it, that there was a printed proposal to run horses on certain terms, what the clerk said after this was published, cannot have the effect of waiving any of those terms, without all the other subscribers are proved to have consented to it.

The plaintiff's counsel then contended, that as the plaintiff's mare could never win the race, the plaintiff was entitled to have his own share of the stake back again, the same as a party who insured a ship, where the risk was never run.

For the defendant it was proved, that, under the name of Flashy Molly, the plaintiff's mare, that was now entered by the name of Funny, had won many races, had started against thorough bred horses, and run for plates.

VAUGHAN, B., (to the Jury).—It will be for you to say, whether the plaintiff has been guilty of an attempt to impose on the other subscribers to the race, by a misrepresentation of his mare; for if so, he will not be entitled to recover back any share of the stake. If the plaintiff knew of the disqualification of his mare, the law will not assist him in the recovery of his deposit.

Verdict for the defendant.

Peake, Serjt., and *Curwood*, for the plaintiff.

Jervis and *M' Mahon*, for the defendant.

[Attornies—*Morrell*, and *Holloway*.]

1827.

HEREFORD ASSIZES.

BEFORE MR. SERJEANT BOSANQUET*.

HAYNES v. HAYTON, Esq.

April 2d.

MONEY had and received. Plea—General issue. It appeared that the plaintiff and his wife, and others, had been indicted at the Easter Quarter Sessions, at Hereford, in the year 1824, for a forcible entry; and the plaintiff entered into the usual recognizances for himself and his wife; and that after the first day of the Sessions, a writ of *certiorari* had been obtained at the instance of the defendants. At the next Sessions the plaintiff's recognizances were estreated, but on the trial of the indictment before Mr. Justice *Littledale*, at the Lent Assizes of 1825, the plaintiff and the other parties indicted, were all acquitted. The clerk of the peace of the county of Hereford, on the 25th of August, made out a list of fines and forfeited recognizances, under the stat. 3 Geo. 4, c. 46, and a writ issued to the defendant, as sheriff of that county, (as directed by that statute), which writ was in the following form:

If a recognizance be estreated at the quarter sessions, and a writ issue to the sheriff to levy under the stat. 3 Geo. 4, c. 46, and the sheriff levy the amount; the Court of quarter sessions have the power to mitigate the amount, although the money has been actually levied, and the sheriff must pay back the difference to the party.

Whether on such a levy the sheriff is entitled to poundage.—*Quære.*

“ George the fourth, &c. To the Sheriff for the county of Hereford, greeting.

“ You are hereby required and commanded, as you regard yourself and all your's, that you omit not by reason of any liberty in your county, city, borough or place, as the case may be, but that you enter the same, and of all the goods and chattels, lands and tenements of all and singular the persons in the several extracts of this writ annexed, you cause to be levied all and singular the debts and sums of money upon them in the same extracts severally imposed and charged, so that the money may be ready for payment

* Mr. Baron *Garrow*, having been obliged to leave Shrewsbury, from an attack of the gout, Mr. Serjeant *Bosanquet* sat for his Lordship during the remainder of the Circuit.

1827.
 HAYNES
 v.
 HAYTON.

at the next general or quarter sessions of the peace, to be paid over in such manner as any two or more of the Lords Commissioners of his Majesty's treasury may direct; and if any of the said several debts cannot be levied by reason of no goods or chattels being to be found belonging to the parties, then in all cases that you take the bodies of the parties refusing to pay the aforesaid debts, and lodge them in the gaol of the said county, there to await the decision of the justices assembled at the next general or quarter sessions, unless the parties shall have given sufficient security for their appearance at such sessions, for which you will be held answerable; and have you there then this writ. Witness, &c."

Under this writ the defendant, as sheriff, seized the goods of the plaintiff, and having refused to take a security, the plaintiff paid into his hands the amount of the recognizances. At the October Sessions, a motion was made to discharge the recognizances, and it was ordered by the Court of Quarter Sessions, "that these recognizances be mitigated to 13s. 4d. each, and that the clerk of the peace do make out the necessary orders for discharging the sheriff, on passing his accounts for the sum of 39l. 6s. 8d. on account of these recognizances." And a similar order of sessions was made in respect of the recognizance entered into for the plaintiff's wife.

It was proved by the clerk of the peace, that he duly transmitted the orders of sessions to the defendant's under-sheriff; and a clerk from the Pipe Office of the Exchequer produced the sheriff's accounts of fines and recognizances, from which it appeared that the sheriff had been discharged from the amount of these recognizances with the exception of 13s. 4d. on each.

Taunton, for the defendant.—The question in this case is, whether after the money was levied, the Sessions had any power to order the recognizances to be discharged.

I submit that they can, under the act of Parliament, only make orders where the party is in custody, or out on bail. There is in the 2d section of the stat. 3 Geo. 4, c. 46, a reference to the schedules; and, from the form of the writ, I contend that although the Sessions may discharge a recognizance before the amount of it is levied; yet, that it has no such power after the execution is executed, and that as soon as the money is actually levied, it belongs to his Majesty, and must be paid as directed by the Lords Commissioners of his Majesty's Treasury.

1827,
HAYNES
v.
HAYTON.

BOSANQUET, Serjt.—I think that the plaintiff is entitled to recover; and I am of opinion that the Sessions had jurisdiction to order what they have done. That part of the 6th section which speaks of a sum of money paid in satisfaction of a forfeited recognizance, appears to me to apply exactly to this case (a).

(a) By the stat. 3 Geo. 4, c. 46, s. 6, it is enacted, "That the court of general or quarter sessions before whom any person so committed to gaol or bound to appear shall be brought, is hereby authorized and required to inquire into the circumstances of the case, and shall, at his discretion, be empowered to order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, or any part thereof; and such order shall be made in the form or to the effect of the schedule marked (C) to this act annexed, and shall be signed by the clerk of the peace; which said order shall be a discharge to such sheriff, bailiff or officer, on the passing of his accounts at the Exchequer, or before any auditor or other proper officer duly authorized to pass the same; and in all

cases where the party shall have been lodged in the common gaol by such sheriff, bailiff or other officer, the justices of the peace so assembled are hereby empowered either to remand such party to the custody of the sheriff, bailiff or other officer, or upon the release of such party from the whole of such forfeited recognizance, to order such party to be discharged from custody, and such order shall be a full and sufficient discharge to the said sheriff, bailiff or officer on the passing of his accounts at the Exchequer or before any auditor or other proper officer duly authorized to pass the same; and it shall and may be lawful to and for the said court of general or quarter sessions to award such costs, charges and expences to be paid by either party to the other, as to the said court shall seem just and reasonable."

1827.
 HAYNES
 v.
 HAYTON.

Taunton.—I submit, that as the sheriff actually levied, he is entitled to deduct his poundage.

BOSANQUET, Serjt.—I should recommend the plaintiff to allow the poundage to be deducted, as it may save a motion for a new trial.

Verdict for the plaintiff, allowing the sheriff's poundage.

Maule and Whitcombe, for the plaintiff.

Taunton, for the defendant.

[Attornies—*Parsons*, and *Harris*.]

April 4th.

REED v. DEERE, Gent, One, &c.

If parties enter into a written agreement, which is duly stamped, and indorse terms on the back of it varying the original agreement, such new terms will not be admissible in evidence without a fresh stamp; and the indorsement of such terms must be considered as putting an end to the original agreement; and therefore the plaintiff cannot recover upon either, but must be nonsuited.

ASSUMPSIT.—The declaration stated, that, in consideration that the plaintiff would forbear to enter two causes for trial at the Hereford Summer Assizes, 1825, &c., the defendant undertook, &c., to abide by, perform, &c., the award of Ebenezer Ludlow, Esq. The plaintiff averred performance of his part of the contract, and stated, that the defendant, not regarding, &c., wrongfully revoked the authority of the arbitrator. There were several special counts in the declaration framed on the two agreements to refer, which are hereafter set forth. Plea—General issue.

It was proved, that two actions had been commenced by the plaintiff against the defendant, in which notice of trial had been given for the Hereford Summer Assizes, 1825, and that previous to that Assize the plaintiff's attorney received the following letter from the defendant.

“ Myself *ats.* Reed.

“ 27th July, 1825.

Deere and Cooke *ats.* Reed.

“ Sir,—You stated in your former letter, that by referring these actions a considerable expense would be saved;

and, in order to do that, I consented to refer to Mr. Ludlow, as you proposed. I am therefore surprised to find by your letter, received this morning, that you intend to enter the causes for trial, by which you will incur a very heavy expense, and oblige me to go to the Assizes; all of which appears to me to be quite unnecessary, because the reference might be made a rule of Court, in the usual way, without all that expense. The costs should be in the discretion of the arbitrator. I consent to the causes being referred to Mr. Ludlow, on the usual terms, and the costs to be in his discretion, and the reference to be made a rule of Court in the usual manner, which will bind us both; but you are determined to incur all the expense of entering the causes for trial. I shall go before a Jury. Your reply, *instantly*, addressed to me, at the post-office, Bristol, will decide. I am your's, &c.

John Deere.

To Mr. Thomas Stokes."

To this letter, by return of post, the plaintiff's attorney sent the following answer:—

" Reed, Esq. v. Deere, Gent.
Same v. Same and Cooke. ,

" I have your letter, and in consequence shall not enter the causes as you wish, but leave them both to the determination of Mr. Ludlow, although I am fully satisfied that the step I proposed would have been the better way for all parties. I am your obedient,

Thomas Stokes.

Bristol, 29th July, 1825."

The first of these letters was stamped about ten days after its date. Mr. Ludlow, after giving several appointments, which were not attended, gave another appointment for the 24th of October, 1825, which was attended by all the parties; but before any witness was examined, the

1827.
REED
v.
DEERE.

1827.
 REED
 v.
 DEERE.

following indorsement was made on the back of the first letter—

“ The within written agreement having been read over and considered by us the undersigned, it is understood and agreed, that all costs are to be in the arbitrator's discretion, and that the parties agree to abide by the arbitrator's decision touching the subject matter of the said two actions, *and what he shall see fit to be done* by the said parties thereto respectively, so *that his award be made* and ready to be delivered to the party requiring the same, on or before the first day of Michaelmas Term next, *or such further day not exceeding the first day of Hilary Term*, as the said arbitrator may appoint.

“ Witness our hands, the 24th day of October, 1825.
 The submission to be made a rule of Court.

Thomas Stokes, atty. for the plt.
 John Deere for self and Cooke,
 so far as the same shall be
 proved to be a partnership
 transaction.”

This indorsement was not stamped.

Campbell and *Maule* for the defendant, objected, that this indorsement on the agreement was not admissible in evidence for want of a stamp, as the virtue of the first stamp was exhausted by the first agreement, and the indorsement, as a new agreement, required a new stamp.

Russell and *Whitcombe, contra*.—The first letter, which is stamped, and this indorsement on it, altogether make but one agreement; and the new terms being added while the whole was in *fieri*, the whole requires but one stamp; and it is like the case of a mistake in a promissory note, which, if altered before it is issued, does not require a new stamp.

Campbell.—The original stamp was imposed when

there was a perfect agreement; and then the question is, whether the indorsement makes any material alteration in that agreement; for if it does, a new stamp becomes necessary. There is, by the first agreement, an unlimited time for Mr. Ludlow to make his award. By the indorsement, he is limited to a particular time. Again, by the original agreement, he is confined to the "usual terms;" by the indorsement, he may direct what shall be done by the parties, which is not a usual term. If this indorsement had been written on a separate paper, there is no doubt that it must have had a stamp. It should also not be forgotten, that the original agreement was acted upon. Mr. Ludlow took upon himself the burden of the arbitration in pursuance of it, by appointing a meeting, and causing all the parties to assemble. I therefore submit that the indorsement is not admissible in evidence for want of a stamp.

1827.
 REED
 v.
 DEERE.

BOSANQUET, Serjt.—The question is, whether this indorsement varies the original terms. I think it does, and that it is therefore inadmissible for want of a stamp.

The indorsement being held to be not admissible in evidence, the plaintiff's counsel wished to go upon the original agreement, as some of the counts of the declaration were framed upon that only.

Campbell, for the defendant.—I submit, that if there was a new agreement entered into, that absorbs the older agreement; and the plaintiff must be called, as he cannot go on the last agreement for want of a stamp.

BOSANQUET, Serjt.—This objection is one of a very strict nature; but I am bound to say, that the new agreement indorsed contains terms different from the former agreement contained in the letter, as it limits the time for making the award, and allows the arbitrator to direct what shall be done between the parties. I certainly think,

1827.
 REED
 v.
 DEERE.

that it appears that the original stamped agreement was departed from; and as the plaintiff is not in a condition to give legal proof of the subsequent agreement, he must be called.

Nonsuit.

Russell and Whitcombe, for the plaintiff.

Campbell and Maule, for the defendant.

[Attornies—*Stokes*, and *Deere*.]

(*Crown Side*.)

BEFORE MR. BARON VAUGHAN.

REX v. JAMES LEWIS and WILLIAM LEWIS.

If there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary.

THE prisoners were indicted for a burglary in the house of John Verry, and stealing money, &c. The house had been secured on the night before, and the thieves entered through a cellar window; this window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar; and through this aperture one of the prisoners thrust his head, and by the assistance of the other he thus entered the house. The prisoners did not enlarge the aperture at all.

Justice, for the prisoners, contended that this was an open window; and, therefore, it was no burglary to enter at it.

Curwood, contra, submitted that this aperture came within the same reasoning as the cases of burglary, where the thief came down a chimney, because it was as much closed as the nature of it would admit.

VAUGHAN, B.—Do you think that if a person leaves a

hole in the side of his house big enough for a man to walk in, a person entering at it with intent to steal goods would be guilty of a burglary? I think not, and I am of opinion that this is not a burglary.

1827.

REX
v.
LEWIS.

The Jury, under his Lordship's direction, acquitted the prisoners of the burglary.

Curwood, for the prosecution.

Justice, for the prisoners.

[Attornies—*Gough*, and *Watkins*.]

MONMOUTH ASSIZES.

BEFORE MR. SERJEANT BOSANQUET.

REX v. SARAH JONES and MARY JONES.

THE prisoners were indicted for the wilful murder of the new born female child of the prisoner Sarah Jones.

The evidence against the prisoner Sarah Jones was, the finding of two cuts across the throat of the child, which the surgeons were of opinion must have been inflicted while the child was alive; and a confession of Sarah Jones that she had cut its throat. However, some of the witnesses for the prosecution stated in their examination in chief, that she had told them that the child was still born.

Carrington for the prisoners, submitted that although, in general, the declaration of a party was not evidence in favour of the party making it, yet if the prosecutors chose to make such declarations evidence, they must take them for good or for bad. Here the prosecutors had adduced in evidence, a declaration of the prisoner, that the child was still born, and having done so, they had made it evidence, and must take the statements it contained to be true. And he cited a case tried before Mr. Baron *Garrow*,

If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt; the Judge will leave the whole of the conflicting statements to the Jury for their consideration: but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the Judge will direct an acquittal.

1827.
REX
v.
JONES.

where a prisoner was indicted for a larceny, and in addition to evidence of the possession of the stolen goods, the counsel for the prosecution put in the prisoner's statement made before the magistrate, in which the prisoner asserted that he had bought the goods. The learned Baron directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together.

BOSANQUET, Serjt.—If this case had been similar to the case cited, I should hold precisely the same as the learned Baron did in that case. There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so; and then the statement of the prisoner, and the whole of the other evidence, must be left to the Jury, for their consideration, precisely as in any other case, where one part of the evidence is contradictory to another.

The learned Serjeant left the whole of the evidence to the Jury, who found

Sarah Jones, Guilty.—Mary Jones, Not Guilty.

Russell and *Talfourd*, for the prosecution.

Carrington, for the prisoners.

[Attornies.—*Prothero & P.*, and ———.]

1827.

GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. SERJEANT BOSANQUET.

GOUGH v. FARR.

April 17th.

BREACH of promise of marriage. The declaration contained the three usual counts:—To marry in a reasonable time;—to marry on request;—and to marry generally. Plea—General issue.

It was proved by the Rev. H. Gough, the brother of the plaintiff, that the defendant, on his asking him what were his intentions towards his sister, said, that he meant to marry her, and that he should wish him to perform the ceremony at his church. The defendant had not married any other person. To shew a breach of the promise, it was proved, that the father of the plaintiff went to the defendant, and asked him if he meant to perform his engagements with his daughter, and the defendant replied,—“Certainly not.”

To support an action for a breach of promise of marriage, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff, and a refusal by the defendant. But if the plaintiff's father go to the defendant, and ask him if he means to fulfil his engagements to his daughter, and he reply, “Certainly not;” proof of this will be sufficient.

Ludlow, for the defendant.—I submit that this is not sufficient evidence of a breach of the contract. A promise to marry is in point of law exactly like any other contract; and the plaintiff must shew not only that the defendant did not, and perhaps would not marry her, but also that she was willing, and tendered herself to marry him. Now, of this there is not the slightest proof. In ordinary cases, this proof is rendered unnecessary by the defendant's having put it out of his power to marry the plaintiff, by having married another. In the present case, the defendant was as much in a condition to marry the plaintiff as he ever was; and *non constat* if she had tendered herself to him, that he would not have fulfilled his engagement by marrying her. With regard to the conver-

1827.
 GOUGH
 v.
 FARR.

sation with her father, that does not help the case: because that, at most, can only shew what the defendant's intentions at that time might be, as he had had no opportunity offered him of *actually* fulfilling his contract. I therefore submit, that there must either be a distinct opportunity given to the defendant to fulfil his engagements, by a tender on the part of the plaintiff; or the necessity of this must be dispensed with, by the defendant's having married another.

BOSANQUET, Serjt.—This point is, I believe, new. I shall not stop the cause on it, but give Mr. *Ludlow* leave to move to enter a nonsuit.

Verdict for the plaintiff—Damages 250*l*.

C. Phillips and *Philpotts*, for the plaintiff.

Ludlow and *Cross*, for the defendant.

[Attornies—*Stone & S.*, and *Bevan & B.*]

IN the ensuing Term, *Ludlow* moved to enter a nonsuit: but the Court of Exchequer held, that although, in cases where the defendant had not married another, there ought to be proof of a tender and refusal; yet that what occurred between the defendant and the plaintiff's father was sufficient evidence of those facts: and their Lordships, therefore, refused the rule on that ground, but granted a rule *nisi* for a new trial for excess of damages.

See the cases of *Daniel v. Bowles*, *Lewis*, Id. 529; and *Foots v. ante*, 553; *Irving v. Greenwood*, *Hayne*, Id. 545. *ante*, Vol. 1, 350; *Wharton v.*

1827.

(*Crown Side.*)

BEFORE MR. BARON VAUGHAN.

REX *v.* THOMAS SMITH.

April 18th,

THE prisoner was indicted for uttering a forged one pound Bank of England note, to Anne Hayward, knowing the same to be forged.

There was a second indictment against the prisoner for uttering another forged one pound note to Emma Hobbs.

On the trial of the first indictment, *Twiss* for the prosecution, to shew that the prisoner knew the note paid to Mrs. Hayward to be forged, wished to give evidence of the other uttering to Emma Hobbs.

Justice, for the prisoner.—I submit that this cannot be done; it is contrary to every principle of English law. It is an endeavour to prove a man guilty of one offence, by shewing him guilty of another. That uttering being the subject of another indictment, we can hear nothing of it on this.

VAUGHAN, B.—I think as the second uttering is made the subject of a distinct prosecution, we are not at liberty to go into evidence of it, even to shew a guilty knowledge in a previous uttering. Other utterings, for which no prosecution had been commenced, have been held to be evidence to shew a guilty knowledge. But even that was much questioned by many able lawyers; and I am of opinion, that if the prosecutors have made the second uttering the subject of a substantive charge, I cannot receive evidence of it in support of the present indictment.

Verdict—Not Guilty.

Twiss, for the prosecution.

Justice, for the prisoner.

[Attornies—*Griffiths*, and —.]

Forgery. If a second uttering be made the subject of a distinct indictment, it cannot be given in evidence, to shew a guilty knowledge in a former uttering.

1827.

OLD BAILEY SESSION, 1827.

BEFORE MR. JUSTICE BURROUGH & MR. JUSTICE LITTLEDAL, AND NEWMAN KNOWLYS, ESQ. RECORDER.

July 14th.

REX v. WILLIAM SHEEN.

If in a plea of *autrefois acquit*, the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But *semble*, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it.

If the prisoner could have been legally convicted on the first indictment, upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not.

INDICTMENT for murder.—The *first* count charged the prisoner with making an assault in and upon “a certain male child of tender age, that is to say, about the age of four months, baptized by the name of Charles William,” and murdering him by cutting off his head with a knife. The *second* count described the child in the same way, except that it stated the child to be “a male *bastard* child,” instead of a male child simply. The *third* count stated the deceased to be “a certain male bastard child of tender age, that is to say, about the age of four months, called and known by the name of Charles William.” The *fourth* count was exactly similar to the third, except that for the name Charles William the name of William was substituted. The *fifth* count was similar to the third, except that for the name Charles William the name of Billy was substituted. The *sixth* count was also like the third, except that the name of Charles was substituted for Charles William. The *seventh*, *eighth*, *ninth* and *tenth* counts were like the third, fourth, fifth, and sixth respectively, except that they omitted the word *bastard*, and called the deceased a “certain male child,” &c. The *eleventh* count was for the murder of a certain male child, &c., (as before) “called and known by the name of Charles Sheen.” The *twelfth* count also described the deceased as a certain male child, &c., (as before) “whose name to the jurors aforesaid is unknown.” The *thirteenth* count was exactly similar to the twelfth, except that there was the addition of the word *bastard* (a).

(a) From the authorities cited that persons other than the defendant or prisoner must be de-

On being called upon to plead to this indictment, the prisoner put in the following plea, which was engrossed on parchment:—

1827.

REX
v.
SHEEN.

“ And the said William Sheen, the younger, being brought to the bar of this Court, and having heard the said indictment read, and the matters therein contained, says, that he ought not to be put to answer the said indictment, he having been heretofore, in due manner of law, acquitted of the premises in and by the said indictment above specified and charged upon him; and for plea to the said indictment, he says, that heretofore, to wit, at the delivery of the King’s gaol of Newgate, holden, &c. [it here set forth the caption of the Session *verbatim*], he the said William Sheen, the younger, was duly arraigned upon a certain indictment, which charged him, the said William Sheen, the younger, by the name and description of William Sheen, the younger, late of the parish of Saint Mary Matfelon, otherwise Whitechapel, in the county of Middlesex, labourer; not having the fear, &c. [it here set out the former indictment *verbatim* (a), concluding with the words ‘his crown and dignity’], to which said last-mentioned indictment, he did then and there plead not guilty, and thereupon a Jury then and there duly summoned, impanelled, and sworn to try the said issue, so joined between our sovereign lord the King and the said William Sheen, the younger; upon their oaths did say, that the said William Sheen, the younger, was not guilty of the said felony

scribed “with convenient certainty, which will hardly be dispensed with except in special cases, and for special reasons.” This description is ordinarily the christian and surname of the person. However, in a case like the present, it might have been better, as there was no surname given to the child, to have described him, for great-

er certainty, as “a certain male child, &c., born of the body of Lydia Beadle.”

(a) In that indictment the deceased was described as “Charles William Beadle, an infant of tender age, that is to say, about the age of four months,” in other respects it was exactly similar to the present indictment.

1827.
 REX
 v.
 SHEEN.

and murder, by the said indictment supposed and laid to his charge: whereupon it was then and there considered by the said Court, that the said William Sheen, the younger, should go thereof acquitted without day, as appears by the record of the said proceedings now here remaining in Court. And the said William Sheen, the younger, avers that the said William Sheen, the younger, mentioned in the former indictment, and he, the said William Sheen, the younger, who is charged by this present indictment, are one and the same person, and not divers and different persons, and that the said infant mentioned in the said first indictment, and the male child in this present indictment mentioned, are one and the same male child, and not divers and different children; and the said William Sheen, the younger, further avers that the felony and murder in the said former mentioned indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder, and not divers and different felonies and murders. And the said William Sheen, the younger, further avers that the said male child, described by the name of Charles William Beadle in the said former indictment mentioned, *was as well known by the said name* of Charles William Beadle, as by any of the several names and descriptions of Charles William, William, Billy, Charles, or William Sheen, or a certain male child, or a certain male bastard child, as he is in and by the present indictment described; and this he is ready to verify. Wherefore he, the said William Sheen, the younger, prays the judgment of the Court here, if he ought to be put further to answer this present indictment. And whether our said lord the King will or ought further to prosecute or impeach him, the said William Sheen, the younger, on account of the premises in this present indictment contained. And that he may be dismissed the Court and go without day.

Robt. Nathaniel Cresswell."

To this plea *Curwood* for the prosecution replied ~~or~~

tenuis as follows: (which he read from a note on the back of his brief.)

“ And Thomas Shelton Esquire, who, for our said Lord the King, prosecutes on this behalf, says, that our said Lord the King ought not to be barred from further prosecuting the said indictment, because he saith, that the said William Sheen, the younger, was not heretofore acquitted of the premises, charged in and upon him by this present indictment; for although true it is, that the said William Sheen, the younger, was acquitted upon the said indictment in his said plea mentioned, and although true it is, that the said infant in the said former indictment mentioned, and the male child in this present indictment mentioned, is the same child, and not another and different child; yet for replication in this behalf, he says, that the said male child was not known as well by the name of Charles William Beadle, as by any or either of the several names by which he is named in the present indictment;—and this the said Thomas Shelton, Esq. on behalf of our said Lord the King, prays, may be enquired of by the country.

R. N. Cresswell, for the prisoner then said—“ And the said William Sheen, the younger, doth the like.”

The prisoner's counsel asked if they might add to this plea, that the prisoner was also acquitted on the coroner's inquisition, in which the deceased was described as Charles William Sheen (a).

(a) This plea had been prepared by the prisoner's counsel. The inquisition had charged the prisoner by the name of William Sheen, with the murder of “Charles William Sheen,” by cutting his throat with a razor. This plea commenced and stated the caption of the session, in precisely the same terms as the foregoing plea, and set forth the caption of the inquisition, and the whole of the inquisition to the end; and then

continued “ and the said William Sheen, the younger, therein called William Sheen, did then and there plead not guilty;” and the plea then went on in the same terms as the other plea to the end; substituting “ inquisition,” for “ former indictment,” and the name “ Charles William Sheen for Charles William Beadle,” and averring the identity of William Sheen, and William Sheen, the younger.

1827.
 REX
 v.
 SHEEN.

1827.

REX
v.
SHEEN.

BURROUGH, J.—If the prisoner by his plea insists on two records, his plea would be double; but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced.

The Court awarded a *venire* returnable *instante*—And the sheriff having made his return forthwith, and the Jury having been sworn—

R. N. Cresswell, for the prisoner, opened his case to the Jury in support of the plea, and put in an examined copy of the register of baptisms of the parish of St. George the Martyr, Southwark, in which the baptism of the deceased was entered “Charles William, the son of Lydia Beadle,” &c.

A witness was called, who proved the identity of the child, whose mother was an unmarried woman, named Lydia Beadle; whom the prisoner had married after the birth of the deceased. This witness stated, that the deceased infant was always called William or Billy, but that she should have known him by the name of Charles William Beadle; and if any one had inquired for him by that name, she would have known who was meant. And the prisoner's father stated, that the child's name was Charles William Sheen, but that he had never heard him called so.

Andrews, Serjt., addressed the Jury, on the part of the prosecution. He cited the case of *Rex v. Clarke (a)*, and called two witnesses, one of whom had been told by the mother of the deceased that his name was William, and

(a) Russ. & Ry. 358, and Carr. Suppl. 41. That case decides that in an indictment for the murder of a bastard child, the deceased ought

not to be described by its mother's surname, unless it has gained that name by reputation.

the other had never heard the deceased called either, or spoken of by any name at all.

1827:
 REX.
 v.
 SHEEN.

Clarkson, for the prisoner replied (a).

BURROUGH J., (in summing up)—The question in this issue is, whether the deceased was as well known by the name of Charles William Beadle, as by any of the names and descriptions in the present indictment; and I ought to say, that if the prisoner could have been convicted on the former indictment he must be acquitted now: And whether at the former trial the proper evidence was adduced before the Jury or not, is immaterial; for if by any possible evidence that *could have been produced*, he could have been convicted on that indictment, he is now entitled to be acquitted.

The first evidence we have is the register; and, looking at that, would not every one have called the child Charles William Beadle; and it is proved by one of the witnesses that she should have known him by that name. It cannot be necessary that all the world should know the child by that name, because children of so tender an age are hardly known at all, and are generally called by a christian name only. If, however, you should think that the name of the deceased was Charles William Sheen, I wish you would inform me of it by your verdict; because it is agreed, that, as that is the name in the Coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal in that inquisition. My brother *Littledale* suggests to me, that if a legacy had been left to this child by the name of Charles William Beadle, he would have taken it upon this evidence; and if this evidence of the child's name had

(a) Although the junior counsel, he replied, by leave of the Court, on the ground that he had been counsel at the former trial.

1827.
 Rex
 v.
 SHEEN.

been given at the former trial, I think the prisoner should have been convicted. The case of *Rex v. Clarke* has been cited; but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William Beadle or Charles William Sheen, or if you think that he was known at all by those names, or either of those names, you ought to find a verdict for the prisoner.

The Jury found, that the deceased was as well known by the name of Charles William Beadle, as by any of the other names.

BURROUGH, J.—There must be judgment for the prisoner. We are obliged to Mr. *Cresswell* for drawing that plea: it was very properly done (a):

Andrews, Serjt., and *Curwood*, for the prosecution.

R. N. Cresswell and *Clarkson*, for the prisoner.

[Attornies—*Martin, H. & S.*, and ———.]

(a) A successful plea of *autrefois acquit* being very unusual in practice, it was thought right to give a report of this case, although it does not strictly come within the

plan of this work. For the law on the subject of pleas of *autrefois acquit*, see 2 *Curw. Hawk.* ch. 35, p. 515; 1 *Stark.* 316; *Arch. Cr. L.* 53.

PROMOTIONS,

1827.



IN the Vacation after *Hilary* Term, *John Vaughan*, Esq., his Majesty's Ancient Serjeant, was appointed one of the Barons of the Court of *Exchequer*, *vice* Sir *Robert Graham*, Knt., resigned.

In the same Vacation, Sir *John Singleton Copley*, Knt. was created a Peer, by the title of Lord *Lyndhurst*, and was appointed Lord High Chancellor of *England*, *vice* *John*, Earl of *Eldon*, resigned:

The Right Hon. Sir *Charles Abbott*, Knt., was also created a Peer, by the title of Lord *Tenterden*:

James Scarlett, Esq., one of his Majesty's counsel, was appointed his Majesty's Attorney-General, *vice* Sir *C. Wetherell*, Knt., resigned, and received the honour of Knighthood:

Sir *Nicolas Conyngham Tindal*, Knt., his Majesty's Solicitor-General, received a patent of precedence:

And *John Bernard Bosanquet*, Esq., Serjeant at Law, was appointed to be one of his Majesty's Serjeants learned in the Law.

In *Easter* Term, Sir *John Leach* was appointed Master of the Rolls, *vice* Sir *J. S. Copley*, Knt.; and Sir *Anthony Hart*, Knt., was appointed Vice Chancellor, *vice* Sir *John Leach*, Knt.

1827.

In the Vacation after *Easter Term*, *Henry Brougham*, Esq., received a patent of precedence ; and *T. C. Treslote*, *George Rose*, and *Henry Bickersteth*, Esquires, were appointed his Majesty's Counsel learned in the Law.

In *Trinity Term*, *William Taddy*, *John Cross*, and *Thomas Wilde*, Esquires, Serjeants at Law, were appointed his Majesty's Serjeants learned in the Law:

John Williams, *John Campbell*, *Frederick Pollock* and *Horace Twiss*, Esquires, were appointed his Majesty's Counsel learned in the Law: and *T. Andrews*, *Henry Storks*, *E. Ludlow*, *H. A. Merewether*, *W. O. Russell*, *E. Lawes*, and *D. F. Jones*, Esquires, were called to the degree of Serjeant at Law; and a few days after, *John Scriven*, *H. Stephen*, and *C. C. Bompas*, Esquires, were also called to the degree of Serjeant at Law.

In the vacation after *Trinity Term*, *C. F. Williams*, and *W. Selwyn*, Esquires, and the Hon. *T. Erskine*, were appointed his Majesty's Counsel learned in the Law.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ACCEPTANCE OF GOODS.

The marking by the vendor, of casks of wine, lying in the docks, with the initials of the purchaser, at his request, and in his presence, the terms of payment not having been settled at the time, and consequently the contract not being complete, is not an acceptance under the 17th section of the statute of frauds. *Proctor v. Jones*,
Page 532.

ACCOMPLICE.

See EVIDENCE, 5.

ACTION, CROSS, FOR LEAVING SERVICE.

See MASTER AND SERVANT, 1.

ADDITION.

If goods be laid in an indictment, as the property of A. W. G. Esquire, the addition is not material; and if he is not an esquire, it is no ground for an acquittal. *Rex v. Ogilvie*. 230.

ADMISSION.

See DAMAGES.

If the defendant has said that he cannot pay a debt, but will give a bill

for it, and the amount be not mentioned, but the defendant speak of having been arrested for it, proof of this admission will entitle the plaintiff to a verdict for 10*l.* as the defendant could not have been arrested for a less sum. *Brathwaite v. Churchill*, 341.

AGENT.

See EMBEZZLEMENT, 1.—PRINCIPAL AND AGENT, 1.

AGREEMENT.

See BANKRUPT, 10.—BROKER, 2.—SHERIFF, 2.—SHIP, 4.—STAMP, 4, 6.

1. If a written paper contain a specification of goods, and the vendor by it agree "to finish the goods in a tradesman-like manner;" this agreement does not require any stamp, as it is an agreement for the sale of goods, and not for the doing of work. And it need not be specially declared on. *Hughes v. Breeds*, 159
2. In *assumpsit* on a written agreement, where the attesting witness to the execution was not produced at the trial: it was held sufficient, in order to let in evidence of his

handwriting, to prove by a person who knew him, that he had not seen him for eighteen months; that, at the request of the plaintiff's attorney, he had made enquiry for him at coffee houses, and other places where he thought he might hear of him, but without success; and that it was not necessary to shew that enquiry had been made of both the parties, who had executed the agreement. An agreement for letting premises, (under hand only) was signed, "H. Curtis & Co." and it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose handwriting it was signed:—*Held*, upon evidence, that both persons acted in the business, that there was sufficient proof of an execution by the partnership. If an agreement for letting part of a house, at a rent of 30*l.* contains a clause that the tenant shall be liable only to the said rent, such clause is a clause of indemnity, and an action will lie upon it, if the tenant's goods are seized under a distress for rent by the original landlord, though the party giving the indemnity be not the immediate tenant of such original landlord. But if no notice be given to the party indemnifying, that he may pay the rent, and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts. *Evans v. Curtis*, Page 296

3. A. makes an agreement with B. for the sale of premises, at the time in the possession of C., under an agreement for four years, (three of which have expired), and undertakes to B. that he will do such repairs as are left undone by C., at the expiration of his (C.'s) tenancy.

B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair.—*Scem-ble*, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy, as created by the agreement between A. and C. If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair, *at the expiration of his tenancy*; the agreement between A. and C. need not be produced to prove such averment. *Goodson v. Gouldsmith*, Page 555

4. Whatever may be the terms of an agreement, with regard to the sum to be paid on the non-performance of it, the party suing, if *the agreement be not under seal*, is only entitled to such damages as a Jury under all the circumstances shall think fit to award. *Randall v. Everett*. 577
5. A performer, who is called upon to resume, in consequence of the illness of another, a part, in which by previous performances she has acquired celebrity, is entitled to reasonable notice, previous to the time of performance. *Graddon v. Price*. 610

ALLEGATION.

See ARREST.

1. An allegation in a declaration that the plaintiff lent a *horse*, is supported by evidence that what he lent was a *mare*. In an action for injury to a horse, proof that the defendant, on being charged with driving it from London to Chatham, instead of to Dartford, according to his undertaking, stated, that in fact he only drove to Dartford, is sufficient to support an allegation that the contract was to drive only to Dartford; and it

APOTHECARY.

is not necessary to offer distinct evidence of what took place at the time when the agreement was made. In such an action, if it appear that the animal was the property of the plaintiff, but let by a stable-keeper to the defendant for a pecuniary recompence, the Judge at the trial will not call upon the plaintiff to shew that he was authorised to let horses for hire, if the defendant does not produce any statute or other authority making regulations on the subject; nor in the absence of such authority will he reserve the point. *Ware v. Juda.*

Page 351

2. If there be a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170*l.* a-year, and afterwards an arrangement is made by parol that 30*l.* a-year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable under it; and therefore an allegation is correct which states it to be 170*l.* *Hilton v. Goodhind.* 591.
3. An allegation in a declaration in slander, which states, that "by reason of the premises, divers persons, to wit," &c., "who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do," is not supported by evidence which shews that other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed him on such recommendation. *Sterry v. Foreman.* 592

APOTHECARY.

1. In an action for an apothecary's bill, it is necessary, since the stat. 6 Geo. 4, c. 1, s. 3, to prove that the seal affixed to a certificate to prac-

ARREST.

645

tise as an apothecary, is the common seal of the Apothecary's Company. *Chadwick v. Bunning,*

Page 106

2. An apothecary is entitled to recover for business done in London, if he had a general certificate from the Apothecary's Company of his fitness to practise, though he paid but 6*l.* 6*s.* on his obtaining it. *Ibid.*

APPRENTICE.

If a person take a lad a month on liking, with an intention of his being bound as an apprentice, if he and the lad suit one another, and the lad stay several months without any indenture being executed, no fresh agreement being entered into, he is not entitled to charge for the board and lodging of the lad whom he employed in his trade; and by consequence he is not entitled to set it off in an action by the lad's father for money lent. *Wilkins v. Wells.* 231

ARREST.

If a sheriff's officer send his servant to a party to inform him that there is a writ out against him, and that he must come and give bail to it, and the party go to the officer's house and execute a bail-bond, this is not an arrest.—A person may, on a declaration properly framed, recover for being maliciously held to bail, if he gave bail to prevent being arrested, on a declaration for a malicious arrest.—An allegation, that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison until, in order to procure his release, he was forced to procure bail, is not a divisible allegation. And if there was a giving bail proved, but no evidence of any arrest, that is not sufficient. *Berry v. Adamson, Gent., One, &c.* 503

ASSAULT.

See BROTHER, 1.

1. Assault by a master on his servant. Justification, *molliter manus*, to remove him from a house of which the master *was possessed*:—*Held*, that evidence of another servant of defendant's having the key to let himself in to work, nobody living in the house, is sufficient evidence of the defendant's possession as against the plaintiff, to support the plea. *Hall v. Davis*. Page 33
2. In an action of assault, what was said by the magistrate to the plaintiff at a previous investigation of the circumstances before him, cannot be received in evidence at the trial on the part of the defendant, unless it drew any observation in reply from the plaintiff. *Child v. Grace*. 193

ASSIGNEE.

An assignee of a lease under the insolvent debtor's act is entitled to a reasonable time in which to decide whether he will accept the lease or not; and during that time he may take such steps as he may think necessary for the purpose of trying to render the property productive. *Lindsay v. Limbert*. 526

ASSUMPSIT.

See DAMAGES, 1.—WITNESS, 8.

1. The City of London Gas Light and Coke Company may maintain *assumpsit* for gas supplied to the occupiers of a wharf; and it is not necessary in such a case that there should have been any contract by deed executed by the company. *The City of London Gas Light and Coke Company v. Nicholls*. 365

ATTORNEY.

2. The Southwark Bridge Company may maintain *assumpsit* for the use and occupation of premises held under them. *The Southwark Bridge Company v. Sills*. 371

ATTESTATION.

See DEED, 1.—WILL, 2.

ATTORNEY.

See NEGLIGENCE, 1.—PRACTICE, 6.—WITNESS, 2.

1. A charge for searching whether satisfaction of a judgment was entered, or whether an issue was entered, will not constitute an attorney's bill a taxable bill, so as to make it necessary to deliver it signed before action brought. *Fenton, Gent., One, &c. v. Correia*. Page 45
2. If an attorney has the money of a client in his hands, and pays such money to the credit of his private account at his banker's, and that banker fail, he will be liable for the amount to the client, although he does so *bond fide*, and have a large sum of money of his own at that banker's. His proper mode would be, to open a new account with a banker in his own name, but to the credit of A. B.'s estate. *Robinson, Clerk, v. Ward, Gent., One, &c.* 59
3. In an attorney's bill, it is not sufficient to charge the costs of an action brought for the now defendant by the plaintiffs as attorneys, at one sum in the lump, although the costs in that action had been taxed at that sum as between party and party. *Drew and Others, Gents., Three, &c. v. Clifford*. 69
4. In an action on an attorney's bill, it is sufficient, to bring the bill within the stat. 2 Geo. 2, c. 23, that some of the items upon the face of them are of such a nature as to shew

AUTREFOIS ACQUIT.

that a cause must have been depending in some Court; and it is not necessary to prove *aliunde* that there was a cause depending. *Watt v. Collins*, Page 71

5. An attorney is not to lose the amount of his bill on account of any error in the execution of his duty, being such an error as a cautious man might fall into; but if the charges contained in his bill are brought upon the client by his inadvertence, he cannot recover them in an action. *Montriau, Gent., v. Jefferys*, 113

6. If an attorney, having given credit to a person for the costs of a suit, put forward such a person as a witness, and have him examined on the trial of the cause without a release (no objection being taken), he cannot afterwards maintain an action against him for the recovery of such costs.—If an attorney's clerk give a receipt for money on account of a different person from that to whom he gives credit, to enable such person to deceive others, such act of the clerk will not affect the master's right to recover the remainder against such person, though, if the attorney had done it himself, it would be good ground for nonsuit. *Williams, Gent., One, &c. v. Goodwin*. 257

AUCTION.

If the owner of goods sold by auction employs a person to puff at the sale, he cannot recover against a *bond fide* purchaser, whose bidding was enhanced by such puffing. *Cromder v. Austin*, 208

AUTREFOIS ACQUIT.

1. If in a plea of *autrefois acquit* the prisoner were to insist on two distinct records of acquittal, his plea would be bad for duplicity. But

BAIL BOND. 647

semble, that if he insisted on the wrong, the Court would, in a capital case, take care that he did not suffer by it. *Rex v. Sheen*, 634

2. If the prisoner *could* have been legally convicted on the first indictment, upon any evidence that *might* have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not. *Ibid.*

3. Form of plea and replication. *Ibid.*

AVERMENT.

See AGREEMENT, 3.—WARRANTY, 4.

AWARD.

When a cause is referred to arbitration, the mode of conducting it must be left to the arbitrators; and if they, after the first or second meeting, exclude both the parties and their attornies, and examine witnesses privately, at their (the witnesses') houses, it seems that such conduct is no good ground of objection, provided it does not proceed from corrupt motives. At all events, if either party would take advantage of it, he must give notice at the time, that he intends to rely on it as an objection; and if he lie by and suffers other meetings to take place, and when the arbitrators are ready to make their award, revokes his submission, he is liable in an action to the other party, who was desirous of having the benefit of the award. *Hewlett v. Laycock*, 574

BAIL.

See ARREST, 1.

BAIL BOND.

See ARREST, 1.—PLEADING, 1.

BANK NOTES.

See CHECK, 2.—PRACTICE, 7.

1. If a banker, in a small market town, change a 500*l.* bank of England note for a stranger, without any further enquiry than merely asking his name, he is liable in trover to a party from whose possession such note had been unlawfully obtained; and the question in such case is not, whether there was an *honest* holding on the part of the defendant, but whether under the circumstances there was a want of due caution. The plaintiff, however, in such case, must shew that he has done every thing which in reason he ought. A dividend warrant was paid into a banker's by a customer; the banker sent it by a porter of the house to the Bank of England, to get cash for it; he returned without the money, saying he had been robbed of it: *Held*, (the porter himself being dead) that proof of those facts was sufficient evidence of possession on the part of the bankers, to enable them to maintain trover for a 500*l.* note, part of the money, against a party into whose hands it had come, under circumstances which would not entitle him to retain possession of it. *Snow v. Peacock*, Page 215
2. The banker of one of the parties in a cause is bound to answer what such party's balance was on a given day, as it is not a privileged communication. *Loyd v. Freshfield*, 325
3. In actions for money had and received, brought by the owners of lost bank notes, against those who may have got them into their hands without giving value, it is not absolutely necessary for the plaintiff to give direct evidence of the loss. It is sufficient if such circumstances are shewn as satisfy the jury of the

fact of the loss. *Holiday v. Sigil*,
Page 176

4. In an action of trover, to recover bank notes belonging to the plaintiffs, which the defendants had taken without using due caution, if it appear that the plaintiffs' porter had different securities for money, to get turned into bank notes and cash; and that he came back with the odd cash, but alleged that the notes, which were the remaining proceeds of the securities, were stolen, it will be for the jury to say, whether the securities were stolen from him before they were cashed, or whether the bank notes were stolen afterwards, and when they were the property of the plaintiffs in his hands. If the latter, it is not material whether the porter purloined the bank notes himself, or was robbed of them by thieves. If the defendants received notice of the loss, that notice is not to be considered in point of law as operating as a notice for all time: and unless such notice be renewed, it will be for the jury to say, whether, if the defendants heard no more of the matter for a year or more, they might not fairly conclude that the notes had been got back. A mistake of the date of one of the notes in such a notice (the number and amount being correctly stated) will not avail the defendants, unless they were misled by it. And it is no answer to an action of this kind that the defendants were always in the habit of changing notes for strangers, without asking the names, &c. of those who brought them, nor even that other country bankers did so; provided the jury are satisfied that the defendants took those notes, under such circumstances as would awaken suspicion in the mind of a reasonable man acquainted with business. *Snow v. Leatham*, 311

BANKRUPT.

BANKRUPT.

Sec DELIVERY-ORDER, 1.—DISTRESS, 2.—NOTICE, 3.—SIGNATURE, 1.—WITNESS, 8.

1. If a trader, who is in the rules of the King's Bench prison, come to his own shop out of the rules, and is there denied to a clerk of a creditor, it appearing by the evidence that the shop was shut up for the evening, but at an earlier hour than usual, it is proper to be left to the jury to say, whether the bankrupt had himself denied to delay his creditor, or whether it was because the clerk called at an unreasonable hour. *Hughes v. Gillman*, Page 32
2. If it be necessary to prove a good petitioning creditor's debt on the 20th of May, it is not sufficient to shew that, on the 29th of January previous, a sum of 100*l.* was due, and that there were receipts and payments afterwards; but it must be proved, that on the specific day as much as 100*l.* was owing. *Gresley v. Price*, 48
3. A debtor to a bankrupt, when sued by his assignee, cannot set up the stat. of limitations as an objection to the petitioning creditor's debt. *Mavor v. Pyne*, 91
4. An allegation, stating that, before the execution of a certain release, the party who executed it "*became and was a bankrupt*," is supported by proof of his having executed it after an act of bankruptcy, which was not followed by a commission for nearly two years, it appearing that the execution took place while the party was in prison. *Ibid.*
5. If a debtor to a bankrupt estate, on being applied to by a person whom he knows to be the collector of the debts for the assignee, says, "I will call and pay the money," such promise is an admission of the right of the assignee, and renders it unnecessary in an action for the

BANKRUPT.

649

money to give the usual proofs in support of the commission. *Pope v. Monk*, Page 112

6. The messenger under a commission of bankrupt may recover from the petitioning creditor his fees for his services, before the party be declared a bankrupt, though the party was since declared a bankrupt, and the messenger's bill ordered by the commissioners to be paid by the assignees out of the estate. *Burwood v. Kant*, 123
7. A party, to become bankrupt, must be a trader at the time of the petitioning creditor's debt; but if that was contracted while he was a trader, and he leave off trade, he may still become a bankrupt. *Doe dem. Barraud v. Lawrence*, 134
8. If one procure orders for goods, having no stock, but buying them from those who have, he making out bills to his customers in his own name, and being himself debited by the person he buys of, that is a trading within the bankrupt laws; but if he procure orders for another, and is by that person paid a commission, the other person sending the goods to the customers, this was not a trading within the bankrupt laws antecedent to the stat. 6 Geo. 4, c. 16. *Ibid.*
9. If a person against whom a commission of bankrupt is sued out, apply to a judge at chambers, and obtain his discharge from custody, on the ground that his detaining creditors have proved under the commission, such person is, by so doing, precluded from disputing the validity of the commission in a court of law, but may apply to the great seal. *Watson v. Wace*, 171
10. An agreement was made, by which the funds of a bankrupt's estate were assigned to a certain person, who was to secure 5*s.* in the pound to all the creditors; in consequence of which the proceed-

ings under a commission which had issued, were to be stayed. The agreement contained a clause making the arrangement void, if any creditor, whose debt was above 10*l.*, should refuse to come in. A deed was afterwards prepared, in which however a similar clause was not inserted. The deed contained a release, but recited the circumstances as a consideration:—*Held*, that promissory notes given in pursuance of the agreement to a creditor, who executed the deed, could not be sued upon by him, it appearing that the commission went on; and the funds were withdrawn from the hands of the maker of the notes, in consequence of the refusal of one of the creditors to execute the deed and enter into the arrangement. *Enderby v. Corder*, Page 208

11. If a trader deny himself to a person, who desires that he may be told that a certain bill of exchange, mentioning the parties to it, is dishonoured, and that he wishes to see him in consequence, such denial is an act of bankruptcy, without further proof of the party's being a creditor, if the jury believe that the bankrupt so considered him. *Bleasby v. Crossley*, 213

12. If one lend another a check for 100*l.*, such check is not evidence of a good petitioning creditor's debt, unless it be proved that it was paid. *Ibid.*

13. A trader stopped payment generally, on the 5th of January, and on the evening of the 6th sent a 100*l.* note to a particular creditor, saying, it was to help him over his payments:—*Held*, that such trader afterwards becoming bankrupt, his assignees might recover the money in assumpsit; although it appeared that at the time of payment a bill for a larger amount was becoming due, which had been accepted by the creditor for the bankrupt's ac-

commodation, and for which he had promised to provide; and that the creditor could not be considered as the agent of the bankrupt to pay the money for the bill, because he being a party to it the payment operated *pro tanto* in his discharge. *Guthrie v. Crossley*, Page 301

14. In an action by the assignees of a bankrupt, communications made by the bankrupt to his attorney may be given in evidence to prove the act of bankruptcy, if the bankrupt consents; and it does not lie in the mouth of the defendant to take the objection to their disclosure. *Merle v. Moore*, 275

15. A warrant under the stat. 6 Geo. 4, c. 16, s. 29, to search for the goods of a bankrupt in the house of a third person, is not valid, if granted to any one except the messenger under the commission. *Sly v. Stevenson*, 464

16. If A. let a house to B., with a covenant that the lease shall determine on B. committing any act of bankruptcy on which a commission of bankrupt should issue. And by another deed of the same date A. grants the use of the furniture to B., in like manner, and with a similar covenant, to allow A. to resume the possession of the furniture on the commission of an act of bankruptcy. If B. become bankrupt, and the Jury find that B. was the reputed owner of the furniture, it will pass to the assignees notwithstanding these covenants. And if it be proved on the one side that several of the servants of B., and many of his customers knew that the goods belonged to A., and on the other side several of B.'s creditors prove that they considered the goods to belong to B., and gave him credit on the faith of them; and that he acted as master of the house, &c.; it will be for the Jury to say, whether B. was held out to the world as the owner of the

BILL OF EXCHANGE.

goods, and obtained credit by the possession of them. *Hickenbotham v. Groves*, Page 492

BILL OF EXCHANGE.

See CONTRABAND, 1.—PARTNER, 1, 3.—PARTICULAR OF DEMAND, 1. PROMISSORY NOTE.—WITNESS, 6.

1. If an accommodation bill be drawn payable to “———, or order,” and after acceptance a *bonâ fide* holder insert his name in the blank, the bill is not thereby vitiated: and it may be sued upon without having any fresh stamp. *Atwood v. Griffin*, 368
2. If a party possess himself of a stolen bill or note improperly, a demand and a refusal are not necessary, previous to an action of trover brought for its recovery by the loser. *Beckwith v. Corral*, 261
3. If a party be robbed of a negotiable security eight days before it is payable, and does not give notice of his loss till the end of seven days, and then only to the payee, but gives no notice of any kind to the public, he does not use due diligence and cannot recover in trover against a party who discounted such security six days after the loss. *Ibid.*
4. And in such a case the questions proper for the Jury are—1st, whether the plaintiff has used due diligence—and then, whether the defendant has acted with due caution, unless there should be reason to suspect that the defendant knew, when he discounted the security, that it had been obtained by means of felony—in which case the conduct of the plaintiff may be left out of the question. *Ibid.*
5. If an action is brought on a bill of exchange, not having any English stamp, and purporting to be drawn at *Paris*, the defendant will be en-

BILL OF EXCHANGE. 651

- titled to a verdict, if it appear from the evidence that the plaintiff must have been in *England* on the day on which it purports to have been drawn: but it will be sufficient to enable the plaintiff to recover, if the bill was drawn at a place in *France*, nearer to *England* than *Paris*, though it be dated as from *Paris*. *Biré v. Moreau*, 376
6. In *assumpsit* on a bill of exchange against the acceptor, when the bill is drawn payable to order in London, it is not necessary to prove presentment at some place in London. *Fayle v. Bird*, 303, *Addenda ix.*
 7. If a letter, giving notice of the dishonour of a bill, contain this passage, “I did not know where, till within *these few days*, you were to be found.”—Such passage is not to be taken, as proving that the notice was not given on the next day after the residence of the party was discovered. *Kerby v. England*, 300
 8. If after a bill of exchange has been dishonoured, and notice of dishonour duly given, the holder take part of the amount of the acceptor, and offer to take a warrant of attorney to secure the payment of the residue by instalments, which offer is not accepted: this is not such a giving of time to the acceptor, as will discharge the drawer; but, if the holder had disabled himself from suing on the bill, it is otherwise. *Hewet v. Goodrich*, 468
 9. An acceptor of a bill is not discharged, by the bill not being presented for payment for three or four years after it becomes due. He is only discharged by payment of the bill, or by a distinct and direct agreement by the holder to discharge him. *Farquhar v. Southey*, 497
 10. In trover for a bill of exchange, the Jury may, if they think fit, include the amount of the interest in

652 BILL OF EXCHANGE.

the damages, and this although there is no mention of interest in the declaration, and no special damage laid. *Paine v. Pritchard*, Page 558

11. If it be ambiguous, whether an instrument be a bill of exchange or a promissory note, the person who receives it may treat it as either. An instrument in the form of a note, but which is in addition addressed to a third party who accepts it, is a promissory note. *Edis v. Bury*, 559

12. The drawer of a bill for 200*l.*, not having received due notice of its dishonour, said, that he did not mean to insist upon want of notice, but added, that he was only bound to pay 70*l.* The whole of his statement must be taken together, and the holder in an action against him, can only recover to the amount of 70*l.* *Fletcher assignee of Billinge v. Froggatt*, 569

13. If the drawer of a bill, payable to his own order, before it is indorsed, give the acceptor a general release, this is no defence to an action by the indorsee against the acceptor, unless there be proof that the indorsee knew of the release. *Dod v. Edwards*, 602

14. In an action by the indorsee against the acceptor of a bill of exchange, if the defendant shew that there was originally no consideration for the bill, it then lies on the other party to shew, that he or some previous indorsee gave value for it. *Thomas v. Newton*, 606

15. What is said by a third party, at the time of the signing of a promissory note, as to the consideration for which it is given, is not evidence against the payee, if he was not present. *Healey v. Jacobs*, 616

16. If a party receive bills of exchange for goods sold, and pay them away, but afterwards get them back, and they are, at the time of the trial of an action of *assumpsit* for the price of the goods, lying protested in the

BROKER.

hands of his agent, he may recover the money due, without delivering up the bills, and the defendant must seek relief in equity, if they are not delivered up. *Haden v. Mendisabal*, Page 20

17. To support an action on a promise by an indorser to reimburse the law expenses to the holder, if he will sue the acceptor, he need not shew that he has actually paid his attorney. *Bullock v. Lloyd*, 119

BOND.

See STAMP, 3.

In an action on an annuity bond given by a man to a woman with whom he cohabits, the question for the consideration of the Jury is, whether, at the time when it was given, there was or was not an intention and agreement to continue the connection in future. For if there was such intention, and the bond was given in furtherance of such arrangement, the plaintiff cannot recover. *Friend v. Harrison*, 584

BROKER.

See CONSTRUCTION, 1.—MONEY HAD AND RECEIVED, 1.—MORTGAGE OF SHIP, 1.

1. A plaintiff cannot sue another for not accepting goods, if the contract note was only signed by the plaintiff; for if the plaintiff only acted as a broker, he cannot sue as a principal: and if he were a principal, his signing would not bind the defendant. *Rayner v. Linthorne*, 124

2. An agreement by a broker that he will sell goods for his principals, and pay over the proceeds without setting off a debt due from the principals to him, is not binding. But if he also agrees not to set off a debt due from a prior firm, which, by a previous letter, the principals had agreed to pay him, the principals having assumed the funds of that firm—the letter and the agree-

CARRIER.

ment must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods. *M'Gillivray v. Simson*, Page 320

BROTHER.

There is no obligation on one brother to maintain another, so as to make the omission indictable.—If one has his idiot brother, who is helpless, as an inmate of his house, and omits to supply him with proper food, warmth, &c., he is not indictable for the omission.—If one has an idiot brother, who is bedridden, in his house, and keeps him in a dark room, without sufficient warmth or clothing, this will not be an assault or an imprisonment; nor will proof of this support an indictment for an assault or an imprisonment.—*Rex v. Smith*, 449

BURGLARY.

If there be an aperture in a cellar window to admit the light, through which a thief enters in the night, this is not burglary. *Rex v. Lewis*, 628

CARRIER.

See PRINCIPAL AND AGENT, 2.

1. A keeper of a booking-office cannot set up a notice, that he will not be answerable above a certain value, as a defence in a case of negligence of himself or his servants. *New-born v. Just*, 76
2. If goods be sold by *A.* to *B.*, and sent by *C.*, a carrier, and on their arrival at the town in which *B.* resides, he takes samples of them, and having no warehouse of his own, lets them remain in the warehouse of *C.*—they cannot after that be stopped in transitu. *Foster v. Frampton*, 469
3. Evidence that at the door of a booking-office there is a board, on which is painted, "Conveyances to all parts of the world," and a list

CHECK.

653

of names of places, is not a sufficient proof that the owner of the office is a common carrier, so as to charge him for the loss of a box which was booked there. *Upston v. Slark*, Page 598

4. If a parcel is given to a waggoner for him to carry for his own gain, and not for the profit of his master, the master is not liable in case the parcel be lost.—If a box of clothes, packed by the party's own hand, be sent by a carrier, and lost, the Judge will recommend the Jury to give the fair value of it in damages, although what particular articles the box contained cannot be proved. *Butler v. Basing*, 613

CATTLE.

See MAIMING CATTLE, 1.

CHARTER-PARTY.

See CONSTRUCTION, 1.

CHECK.

See PUBLIC HOUSE, 2.

1. The plaintiff having lost a check, five days after it bore date, which was taken by the defendants for value, but under such circumstances, as ought to have excited their suspicion:—*Held*, that the plaintiff may maintain an action for money had and received against them, for the amount of it, though he gives no evidence how he lost it, or how it got out of his possession. Whether such evidence would have been necessary, if the check had been received by the defendants on the day it bore date,—*Quære?* *Downe v. Halling and Others*. 11
2. If a check drawn by one of the parties in a cause, be proved to be in the hands of the banker of such party (having paid it) the opposite party need not, if he wishes to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce. *Burton v. Payne*. 520

CLERK.

See ATTORNEY, 5.—NOTICE, 3.—
MASTER & SERVANT, 1.

CLUB-HOUSE.

1. The master of a club-house, is the proper person to sue one of its members for the arrears of his subscriptions; and if, by one of its rules, every member is to be taken as continuing so, unless he give previous notice of his intention to discontinue being a member, he is liable to be sued for his arrears of subscriptions, unless he can prove that he gave such notice. *Raggett v. Bishop*, Page 343
2. If the rules of a club be contained in a book kept by the master of the club, and accessible to the members, every member of the club must be taken to be acquainted with them. *Raggett v. Musgrave, Bart.* 556

COINING AND UTTERING
COUNTERFEIT COIN.

1. A collar of iron, for graining the edges of counterfeit money, is an instrument within the stat. 8 & 9 W. 3, c. 26, s. 1, though it is to be used in a coining press. *Rex v. Theodore Moore*, 235
2. If two prisoners are indicted for uttering a counterfeit shilling, having another counterfeit shilling in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces of money are proved to be counterfeit; and if it appear that the two prisoners went to a shop, and that one of them went in and uttered the bad money, having no more in her possession, and the other stayed outside the shop, having other pieces of bad money, both may be convicted; the uttering and the possession being both joint. *Rex v. Skerritt*, 427

CONTRABAND.

COMMISSIONERS.

If certain commissioners under a private act of Parliament may sue and be sued by their clerk, it is not necessary, at the trial of an action brought in the name of the clerk, to prove that he sues by their authority. *Trumhitt v. Depree*, Page 557

COMPENSATION.

See NUISANCE, 3.

CONSENT OF OWNER.

See TIMBER.

CONSPIRACY.

See JOINT STOCK COMPANY, 3.

CONSTABLE.

See FALSE IMPRISONMENT, 6, 7.

A constable who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has thereby a right of action (supposing the warrant illegal) against the magistrate under whom he acts. *Sly v. Stevenson*, 464

CONSTRUCTION.

See WORD.

If one construction of a charter party be much in favour of one of the parties, and an opposite construction equally in favour of the other, the evidence of the broker through whom it is entered into, as to what was said at the time of its execution, is of too dangerous a nature to be much relied on. *Taylor v. Briggs*, 525

CONTRABAND.

If the importation of certain goods be prohibited, and the plaintiff sell such goods in this country to A., who indorses a bill of exchange to him in payment; the plaintiff cannot recover on that bill, against the acceptor, although there was

COPYRIGHT.

no evidence that the plaintiff was the importer of the prohibited goods. *Billard v. Hayden*,
Page 472

CONTRACT.

See ACCEPTANCE, 1.—PUBLIC HOUSE,
1.—USE AND OCCUPATION, 1.

1. *Assumpsit* on a judgment of the Admiralty Court of Scotland, which gave interest on a balance of accounts from 1811 to the time of payment. The contract was by letter written in London; the services were performed in Scotland, that being the plaintiff's place of residence: *Held*, at *Ni. Pri.* that a contract made in England, to be executed in Scotland, ought to be regulated by the rules of the English law; and that this contract having been made in England, interest could not be recovered, though given by the decree in Scotland. *Arnott v. Redfern*, 88
2. In an action on a joint contract against two defendants, an arrangement proposed by one defendant, that each should pay a moiety of the damages, cannot be made, unless the other defendant, either in person or by counsel, consents, though it is a relief of such defendant, who might otherwise have execution taken out against him for the whole. *Dickinson v. Goom & Barnes*, 194

CONTRIBUTION.

See PARTNER, 6.

CONVERSION.

See MILLER, 1.

COPYRIGHT.

No action can be maintained for pirating a work which professes to be the amours of a courtesan, and it is no answer to the objection that the defendant is also a wrong doer

COVENANT. 655

in publishing them, and that he therefore ought not to set up their immorality. *Semble*, that a person being seen correcting the manuscript, is not sufficient evidence that the copyright of the work is his. *Stockdale v. Onmbyn*,
Page 163

CORPORATION.

See ASSUMPSIT, 1, 2.

COSTS.

See ATTORNEY, 3.

COVENANT.

See FORFEITURE, 2.—BANKRUPT, 16.

1. If a covenant is entered into, that if the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the emoluments, and this without the knowledge of the person who has the right of appointing to the office:—This is such a fraud on him as will avoid the covenant, whether the office is lawfully saleable or not. *Waldo v. Martin*, 1
2. If there are two parts of a covenant under seal, one of them on a stamp, and executed by the defendant, and the other a counterpart not stamped, and the party who had the custody of the part which was stamped at the time of bringing an action upon it has lost it, and it cannot be produced, he may prove the draft as secondary evidence, and is not compellable to take the unstamped counterpart subject to the objections that may be made to it, though he has given notice to produce it at the trial. *Munn v. Godbold*, 97
3. If a lessor covenant in a lease with his lessee that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state

in which they were when he let them, and not to rebuild any *additional* parts which may have been erected by the tenant. *Loader v. Kemp*, Page 375

COUNTY COURT.

See SHERIFF, 3.

COURT OF CONSCIENCE.

A Court for the recovery of debts under 40s. may give judgment for the plaintiff, although it appear the debt was above 40s., if the plaintiff will waive so much of his debt as will bring his claim under 40s., provided there be nothing in the act of Parliament constituting that Court which prevents its so doing. The judgment of a Court for the recovery of debts under 40s. is not conclusive; but proof that the plaintiff sued there for the debt he now seeks to recover, and that his complaint was dismissed on merits, is proper for the consideration of the jury. *Barnes v. Winkler*, 345

COURT MARTIAL.

See FALSE IMPRISONMENT, 1.

CREDIT.

See ATTORNEY, 5.

DAMAGES.

See ADMISSION.—AGREEMENT, 4.—CONTRACT, 2.—SERVICE, LOSS OF, 1.

Assumpsit for goods sold. If a defendant say that he owes the debt, and that the plaintiff has applied to him to pay him, and that he will do so as soon as he can, but does not mention any sum; on this evidence the plaintiff is entitled to a verdict with nominal damages. *Dixon v. Deveridge*, 109

DATE.

See SIGNATURE, 1.

DAY RULE.

A prisoner in the Fleet prison had ob-

tained a day rule in the usual form, permitting him to go abroad to transact his affairs, and advise with his counsel, and to return the same day; he went to Sadler's Wells Theatre, where he was seen as late as half-past eleven in the evening: *Held*, that if he returned within the ambit of the prison before twelve at night, the Warden could not be liable in an action for an escape, notwithstanding the abuse and misapplication of the rule. *Rathbone v. Brown*, Page 535

DEBT.

See STATUTE OF FRAUDS, 1.

In an action for money had and received, if it appear that the defendant received the money from the plaintiff to carry to a bank, and that instead of so doing, the defendant kept it; the Judge will leave it to the jury to say whether the defendant received it with an intent to steal it, and then feloniously converted it; and if the jury find this in the affirmative, the Judge will direct a verdict to be entered for the defendant, and that the defendant shall be tried for the felony on this finding. *Prosser v. Rowe*, 421

DECEIT.

See GOODS RETURNED, 1.

DECLARATION.

See AGREEMENT, 3.—MALICIOUS ARREST.—WARRANTY, 4.

DEEDS.

Deeds ought to be attested in the same room in which they are executed, and not carried away for attestation; the witnesses ought to be careful that they hear the formal words of delivery used; and it is highly expedient that the party executing should state that he fully understands what he is executing. But to make the party designate

DILAPIDATIONS.

the instrument in the presence of the witnesses, as by saying "this is my power of attorney," or the like, would be laying down a rule sometimes productive of inconvenience. *Loyd v. Freshfield*, Page 325

DELAY.

See GOODS RETURNED.

DELIVERY OF DEEDS.

See DEEDS, 1.

DELIVERY OF GOODS.

See MILLER, 1.

DELIVERY-ORDER.

See MILLER, 1.

The lodging a delivery order with a wharfinger is sufficient to transfer the property in goods lying at a wharf, without any re-weighing or re-housing; and if the party giving the order afterwards become bankrupt, his assignees cannot maintain trover under such circumstances, as for goods in his order and disposition. *Tucker v. Ruston*, 86

DEMAND.

See BILL OF EXCHANGE, 2.—FORFEITURE, 1.

DEMURRAGE.

If a freighter is to discharge within twelve running days after the vessel's arrival, and he is prevented from discharging, at first, by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with all reasonable diligence; and he is not, as matter of right, entitled to the whole original number of days from the time when he is able to commence discharging. *Rogers v. Hunter*, 601

DEPOSIT.

See PUBLIC HOUSE, 1.

DILAPIDATIONS.

1. The executors of a deceased in-

VOL. II.

DOWER.

657

cumbent are not bound to put the rectory house into a *finished* state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the preservation of the premises. *Percival (Clerk) v. Cooke*, Page 460

2. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber, in the estimate of dilapidations due from them. *Ibid.*

DISTRESS.

See WAREHOUSE, 1.

1. A lodger may maintain an action if his goods are taken on an excessive distress by the landlord of the party under whom he occupies. *Fisher v. Algar*, 374
2. The request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises, beyond the proper time of selling, if he did not know which were the goods of the lodger, and which those of the tenant. *Ibid.*
3. Barges lying in a river, close to a wharf, and fastened to piles intended partly for the support of the wharf, and partly that barges may be attached to them, may be distrained for rent due in respect of the wharf, they being as much on the premises demised as the nature of the thing will admit of. *Buszard v. Capel*, 541

DOCKS.

See ACCEPTANCE, 1.

DOUBLE RENT.

A landlord has no right to distrain for double rent upon a *weekly* tenant, who holds over after notice to quit. *Sullivan v. Bishop*, 359

DOWER.

Ejectment does not lie for dower

X X

which has not been assigned. *Doe d. Nutt v. Nutt*, Page 430

EJECTMENT.

See **INSOLVENT**, 1.—**DOWER**, 1.

1. In an action of ejectment the plaintiff must be nonsuited, if it be proved that a notice to quit at the end of six months was given by the lessor of the plaintiff to the occupier of the premises, a short time before the bringing of the action. *Doe d. Scott v. Miller*, 348
2. In ejectment by an heir-at-law against a defendant, who claims under a lease granted by an ancestor of the lessor of the plaintiff, if such lease, being in the hands of the lessor of the plaintiff, be produced at the trial by him on notice, it may be given in evidence without proof of its execution by the subscribing witness. *Doe d. Tindale v. Hemming*, 462

EMBEZZLEMENT.

The statute 53 Geo. 3, c. 63, for preventing the embezzlement of securities, &c. by agents, applies only to persons to whom such securities, &c. are entrusted in the exercise of their function or business. *Rex v. Prince*, 517

ENTRIES, OLD.

See **PARISH**, 1.

ESCAPE.

See **DAY-RULE**, 1.

ESTIMATE.

If an engineer is employed by a committee for erecting a bridge and forming a road to it, to make an estimate of the expense of the works, he is bound to ascertain for himself, by experiments, the nature of the soil,—though a person previously employed by such committee, having made the experiments, gives him, by their desire, information of the result. *Moneypenny v. Hartland*, 378

2. If an engineer, employed as above, makes a low estimate, and thereby induces persons to subscribe for the execution of the work, who would otherwise have declined it; and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at a much greater expense, he is not entitled to recover any thing for his trouble in making such estimate. *Moneypenny v. Hartland*, Page 378

EVIDENCE.

- See **ADMISSION**.—**AGREEMENT**, 2.—**ALLEGATION**, 1.—**ASSAULT**, 1, 2.—**BANK NOTES**.—**BANKRUPT**, 14.—**CHECK**, 1, 2.—**COINING AND UTTERING**, 2.—**CONSTRUCTION**, 1.—**CONTRABAND**, 1.—**COPYRIGHT**, 1.—**COVENANT**, 2.—**DAMAGES**, 1.—**EJECTMENT**, 2.—**FALSE IMPRISONMENT**, 1, 2.—**FALSE REPRESENTATION**, 1.—**FINE**, 1.—**FOREIGN STATE**, 1.—**HUSBAND AND WIFE**, 2, 3.—**INDICTMENT**, 1.—**LARCENY**, 1, 2.—**LIBEL**, 2, 3.—**MAGISTRATE**, 1.—**MILLER**, 2.—**PARISH**, 1.—**PARTNER**, 2.—**PATENT**, 1.—**PLEADING**, 1.—**PRACTICE**, 4, 6, 7.—**PROMISSORY NOTE**, 1.—**REGISTRY OF DEEDS**, 1.—**SEDUCTION**, 1.—**SIGNATURE**, 1.—**SLANDER**, 2.—**STOPPING IN TRANSITU**, 1.—**TIMBER**, 1.—**TITHES**, 2.—**WARRANTY**, 3.—**WILL**, 1.—**WRIT OF RIGHT**, 5.—**WRITING, HAND**, 1.
1. The fact of a letter having been sent to a woman some years before her death, is not sufficient to raise a presumption that such letter is in the custody of her executrix three or four years after, as the testatrix might have destroyed it in her lifetime. *Drew v. Darnborough*, 198
 2. A person to whom certain letters, required to be produced on a trial, were written, said that he had searched in a particular box in which he thought he had put them, without be-

EVIDENCE.

- ing able to find them, but added, that he thought they were somewhere in his possession, but that he had not searched in any other place than the box:—*Held*, that enough had not been done to let in secondary evidence of the contents of the letters. *Bligh v. Wellesley*, 400
3. Evidence of reasonable suspicion of felony may be given in mitigation of damages, in an action of false imprisonment. *Chinn v. Morris*, 361
4. In *assumpsit* on an attorney's bill, where the charges are for business done for two persons, partners, if one only is sued, and there is no plea in abatement, the other may be called as a witness for the plaintiff. *Fawcett v. Wrathall*, 305
5. The Judges will not in general admit an accomplice as king's evidence, though applied to for that purpose in the usual way by the counsel for the prosecution, if it appear that such accomplice is charged with any other felony than that on the trial of which he is to be a witness. 411
6. If a prisoner in gaol on a charge of felony ask the turnkey of the gaol to put a letter into the post for him, and after his promising to do so the prisoner give him a letter addressed to his father; and the turnkey, instead of putting it into the post, transmit it to the prosecutor, this letter is admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained. *Rex v. Derrington*, 418
7. On an indictment for a larceny, if the prosecutor rests his case on the prisoner's recent possession of the goods, and the prisoner call a witness to prove that he (the prisoner) bought them of J. S.; if the prosecutor call J. S., he can only ask him as to such matters as go to negative the prisoner's case, and cannot prove by him that he saw

FALSE IMPRISONMENT. 659

- the prisoner commit the theft. *Rex v. Stimpson*, Page 415
8. If the declaration of the prisoner, in which she asserts her innocence, be given in evidence on the part of the prosecution, and there be evidence of other statements confessing guilt, the Judge will leave the whole of the conflicting statements to the Jury for their consideration; but if there be in the whole case no evidence but what is compatible with the assertion of innocence so given in evidence for the prosecution, the Judge will direct an acquittal. *Rex v. Jones*, 629

EXECUTION.

See SHERIFF, 1.

EXECUTOR.

See STATUTE OF LIMITATIONS, 1.—
WITNESS, 5.—TROVER, 3.

FABRICATION OF SHARES.

See JOINT STOCK COMPANY, 3.

FALSE IMPRISONMENT.

See BROTHER, 1.

1. Action for false imprisonment by a master of a man of war against his captain. The defendant pleaded two sets of pleas. The first set stated that he imprisoned the plaintiff in order to bring him to a court martial for disobedience of his orders, quarrelling, &c. The second set averred, that the imprisonment took place in consequence of charges brought against the plaintiff by a superior officer. The sentence of a court martial held to investigate the charges is not receivable in evidence on this state of the pleadings; but to make it so, it should be pleaded as an estoppel; and it is open to the Jury,

660 FALSE IMPRISONMENT.

if they believe that the imprisonment took place on the charges stated in the first set of pleas, to inquire into the truth of those charges, notwithstanding the decision of the court martial upon them. *Hannaford v. Hunn*,

Page 148

2. If three defendants have jointly imprisoned the plaintiff, the declaration of one of the defendants, made three weeks after, in the absence of the others, tending to shew that the imprisonment arose from malice, is admissible in evidence in an action for false imprisonment brought against all the three. *Wright v. Court*, 232
3. If in an action for false imprisonment two of the defendants are acquitted, because they were constables, and the venue was not laid in the proper county, another defendant is not entitled to be acquitted as acting in their aid, if in his plea he state that he, "as owner of a certain house, and the other defendants as constables acting in his aid, took the plaintiff, &c." *Bond v. Rust*, 342
4. If a party be turning towards the wall in the street at night for a particular occasion, a watchman is not justified in collaring him to prevent his so doing. *Booth v. Hanley*, 288
5. If a constable tell a person given into his charge, that he must go with him before a magistrate, and such person in consequence goes quietly, without any force being used by the constable, it is a sufficient imprisonment to support an action of trespass. *Chinn v. Morris*, 361
6. If a reasonable charge of felony be made against a person, who is given in charge to a constable, the constable is bound to take him, and will be justified in so doing, although the charge may turn out to be unfounded. If a person be

FALSE REPRESENTATION.

taken by a private individual without warrant, on suspicion of felony, and will not tell his name, and otherwise conducts himself, so as to excite suspicion; this only goes in mitigation of damages, if it turn out that no felony was committed. The stat. 3 Geo. 4, c. 55, s. 21, which relates to the apprehension of *reputed thieves* without warrant, only extends to persons *generally reputed* to be thieves, and not to persons suspected of a particular theft. *Cowles v. Dunbar*,

Page 565

7. If A. imprison B., and in continuation of that imprisonment A. deliver B. to the charge of C., who keeps B. in custody, the acts and declarations of C. are evidence against A. in an action for false imprisonment. *Powell v. Hodgetts*, 432
8. In an action for false imprisonment, the defendant justified under the 1 Geo. 4, c. 56 (commonly called the petty trespass act), as the owner of land on which the plaintiff was trespassing. It was held that to make out his justification, he must give positive proof of actual damage being done, so as to enable the Jury to decide on the quantum of it; and that the Jury were not to presume damage from the mere fact of a trespass being committed.—*Semble*, that the principle of this decision will apply to the substituted provisions of the 7th & 8th Geo. 4, c. 30, the above act of 1 Geo. 4, having been wholly repealed by the 7 & 8 Geo. 4, c. 27. *Butler v. Turley*, 585

FALSE REPRESENTATION.

If the declaration state that the defendant falsely represented that in his public-house "his returns had averaged and then averaged 300l. a month"—this allegation is proved by evidence that he said he was

FORCIBLE ENTRY.

“doing 300l. a month in the house”—the fact that he named his brewer, and kept a pass-book of his beer and spirits, and that the plaintiffs neither enquired of the brewer nor asked for the pass-book, do not go in bar of the action, but are fit matter for the consideration of the Jury on the question whether the defendant practised a fraud and deceit on the plaintiffs. *Bowring v. Stevens*, Page 337

FALSE RETURN.

See WRIT, 1.

FELONY.

See DEBT, 1.—INDICTMENT, 2.—
FORGERY, 1.

FELONIOUS TAKING.

See HORSE-STEALING, 1.

FEME SOLE.

See HUSBAND AND WIFE, 5.

FINE.

A fine being levied “of 12 messuages, &c. and 20 acres of land,” if it appear that there are 19 houses on the conusor's land in that place, this is such an ambiguity in the fine as to let in parol evidence to shew what part of the property was meant to be included in the fine, though the whole of the land the conusor had was under 20 acres. *Denn d. Bulkeley v. Wilford*, 173, *Addenda*, iii.

FLEET PRISON.

See DAY RULE, 1.

FORCIBLE ENTRY OR DETAINER.

To constitute a forcible entry or forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of persons and shew of force as is calculated to deter the rightful owner from sending the persons away, and

FOREIGN STATE. 661

resuming his own possession. *Miller v. Maclean*, Page 17

FORFEITURE.

See EJECTMENT, 1.

1. To support an ejectment on a forfeiture of a lease by non performance of a covenant, if the covenant be to do an act, the lessor of the plaintiff must give some evidence of the omission of the act; and if the covenant be for payment of rent, the lessor of the plaintiff must prove a demand of such rent.—*Doe d. Chandless v. Robson*, 245
2. If, on the trial of an ejectment against the assignee of a tenant, on a forfeiture of a lease by breach of covenant, it appear that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought—the landlord cannot recover, though the covenants be actually broken, and there be neither release nor a dispensation on the part of the landlord. *Doe d. Knight v. Rome*, 246

FOREIGN STATE.

- If a foreign state is recognized by this country, it is not necessary, to support an allegation which describes it as a state, to prove that it is in fact an existing state; but if it be not so recognized, then such proof becomes necessary, and may be admitted.—If a body of persons assemble together to protect themselves, and support their own independence, and make laws, and have courts of justice, that is evidence of their being a state, and it makes no difference whether they formerly belonged to another country or not, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it. *Yrisarri v. Clement*, 223
2. A foreigner has no right to negotiate in England a loan for the use

662 FRAUDS, STATUTE OF.

of a state which has separated itself from, and is at war with one of England's allies (such state not being at the time recognized by England), without the permission of the English government; and if a letter in an English newspaper merely animadvert, though in the strongest terms, upon the illegality of such a transaction, it is no libel: otherwise, if it go beyond that, and impute a moral fraud to the party engaged in it. *Yrisarri v. Clement*,
Page 223

3. If in the inducement in a declaration in an action for a libel, two places are described as "states," and in the libel itself allusion is made to one, and the other is actually mentioned under the title of a "neighbouring state," it is not necessary that the plaintiff, at the trial, should prove that either of them were in fact states. *Ibid.*

FORGERY.

If a second uttering be made the subject of a distinct indictment, it cannot be given in evidence to shew a guilty knowledge in a former uttering. *Rex v. Smith*, 638

FRAUD.

See COVENANT, 1.

FRAUDS, STATUTE OF.

See PUBLICATION IN NUMBERS, 1.

A mother took her son to school, and saw the master, but no evidence was given of what passed at that time. Afterwards, a bill was delivered to the boy's uncle, who said it was quite right to deliver the bill to him, for he was answerable:—*Held*, that the statute of frauds did not apply, and it was proper to leave it to the Jury to say, under those circumstances, whether the original credit was not given to the uncle. *Darnell v. Tratt*, 82

HORSE-STEALING.

GOODS RETURNED.

If a person purchases an article, and suffers it to remain on his premises for two months, without examination, and then finds it to be unfit for use, he cannot, after that length of time, avail himself of the objection in answer to an action for the price, unless some deceit has been practised with regard to the article. *Percival v. Blake*, Page 514

HEALTH.

See NUISANCE, 2.

HORSE.

See WARRANTY, 1, 2, 3, 4.

HORSE-RACE.

If, to qualify a horse to start for a certain stake, it should have been regularly hunted with the hounds of Sir T. M., it is not necessary that the horse should have been hunted every day the hounds went out, but once hunting with those hounds is not sufficient. If a race be advertised to take place under certain conditions, the stakeholder cannot waive any of the conditions without the consent of the whole of the subscribers; and if the plaintiff's horse was disqualified, as not being within the description of horses that were to run, he cannot recover back his original share of the stake, if he was aware of the disqualification, and was guilty of a misrepresentation. *Weller v. Deakins*, 618

HORSE-STEALING.

If a thief go to an inn, and intending to steal a horse, direct the ostler to bring out his horse, pointing to that of the prosecutor, and the ostler at his desire lead out the horse for the prisoner to mount—this is a sufficient taking by the prisoner to support an indictment for horse-stealing. *Rex v. Pitman*, 423

HUSBAND AND WIFE.

HUSBAND AND WIFE.

See LARCENY, 1.

1. If a wife quits her husband's house under a fair apprehension of personal violence, that is equivalent to her husband's turning her out of doors; and improper restraint of her person in a mad-house is, for this purpose, personal violence; and therefore a party supplying her with necessaries may recover for them against the husband. If she quits her husband's house because he brought a common woman to reside in it, that is also a sufficient reason for her going; and if the husband is sued for necessaries supplied to her, it is no answer to the action, that she had committed adultery previous to the credit being given, if the husband did not know it till after the credit; nor that, after the credit, she obtained a decree for alimony, which alimony was to relate back to a period before the credit. *Houlston v. Smyth*,
Page 22
2. If, to rebut the presumption that a wife left her husband's house from his cruel treatment of her, letters written by her to her husband in affectionate terms are offered in evidence, it must be proved at what time they were written, or they are not admissible in evidence: and the dates of them are not sufficient proof of the times at which they were written. *S. C.* 24
3. The minute-book of the Consistorial Court is sufficient evidence of a decree for alimony pronounced in that Court, without such decree being drawn up in form. *S. C.* 25
4. If a husband and wife are living together, and business is carried on in the house in which they live, though the wife's name only appears in the purchase of goods, in the parish rates, and in a contract with the parish officers, yet the

INDICTMENT. 683

husband, partaking of the profits of the trade, and being aware of, and assenting to the dealings, is liable in an action for goods delivered at their house for the purposes of this trade, though the bills of parcels are headed in the wife's name. *Petty v. Anderson*,

Page 38

5. If a *feme sole* is carrying on a trade, and, before her marriage, conveys her "stock in trade, furniture, and other articles belonging to her in and about the said business" to a trustee for her separate use, and then marries, such property is not liable to be taken in execution for the debts of her husband, though some of the articles have been disposed of, and others purchased for her use in their stead. *Dean v. Brown*, 62, *Addenda* i
6. If a tradesman bring an action against a husband for goods furnished to his wife while she was living apart from her husband, it is for him (the tradesman) to shew, that her so living proceeded from some cause which would justify it. *Mainwaring v. Leslie*, 507

IDIOT.

See BROTHER, 1.

INDICTMENT.

See ADDITION, 1.—BROTHER, 1.—EVIDENCE, 5.—JOINT-STOCK COMPANY, 3.—NUISANCE, 2, 3.—PERJURY, 1.

1. It is no objection to evidence on an indictment for felony, that it also goes to shew the prisoner guilty of another felony. *Rez v. Moore*, 235
2. An indictment charging that a prisoner "did feloniously and maliciously, with intent to extort money, charge and accuse A. B. with having committed the horrible and detestable crime, &c., and feloniously, &c. menace and threaten to prosecute the said A. B. &c." is not

good under the stat. 4 Geo. 4, c. 54, s. 5. But if the indictment follow the statute, and the evidence be of a threat to *prosecute*, the Judge will leave it to the jury to say whether that was not a threatening to accuse. *Rex v. Abgood*, Page 436

INITIAL.

See SIGNATURE, 1.

INSOLVENT.

See ASSIGNEE, 1.

1. The provisional assignee of the Insolvent Debtors' Court may maintain ejectment for the property of the insolvent, notwithstanding the provisions of the 1 Geo. 4, c. 119, and the 3 Geo. 4, c. 123. *Doe d. Clark v. Spencer*, 79
2. If an insolvent in his schedule describe a bill of exchange as in the hands of D., that is sufficient to discharge him from his liability, though D. may have indorsed it over. And if he state it in his schedule as drawn by himself on M., whereas it was drawn by M. on him, it will be for the jury to say, whether they are satisfied that the same bill was meant, and whether, if it were, they think the misdescription was by mistake, or meant to mislead any one; for if they think the same bill was meant, and that the misdescription was by mistake, it is a good discharge. *Nias v. Nicholson*, 120
3. An insolvent debtor is not a competent witness for the plaintiff in an action by his assignee to recover a sum due for work done by him before his insolvency. *Wilkins v. Ford*, 344
4. The interest of an insolvent debtor in premises held by him from year to year, under an agreement for a lease, passes by the assignment to the provisional assignee, so as to prevent the insolvent from maintaining ejectment against his tenant with respect to the same,

JOINT-STOCK COMPANY.

notwithstanding no act has been done by such provisional assignee, to shew his acceptance or his refusal of the lease. *Doe d. Palmer v. Andrewes*, Page 593

INSURANCE.

One of the conditions in a policy of insurance from fire stated, that if any difference should arise on any claim, it should be immediately submitted to arbitration, and after directing how the arbitrators should be chosen, added, that no compensation should be payable until after an award determining the amount thereof should be duly made.—It was held, that the assured might maintain an action on such policy, notwithstanding the condition, where it appeared that the insurers denied the general right of the assured to recover anything, and did not merely question the amount of damage. *Goldstone v. Osborn*, 550

JOINT-STOCK COMPANY.

See PROMISSORY NOTE, 2.

1. If persons connect themselves with a company of this description, they are every one of them liable to pay the demands upon it. *Keasley v. Codd*, 408
2. A company formed for the purpose of making a rail-way, one of the regulations of which was, that 15,000 shares of 50*l.* each should be raised, and then that application should be made to Parliament, and which, after continuing for rather more than a year, was dissolved, because no eligible line of road could be found, is not an illegal company under the act 6 Geo. 1, c. 18, so as that a party who has bought shares may on that account recover back the money for them: but if the party who has sold shares has not complied with a regulation of the company, stating that all transfers, to be valid, must be approved by a committee,—so that

KING'S EVIDENCE.

this transfer to him was not a legal transfer,—a person who has purchased of him may recover the money paid, on the ground that the consideration has failed, though he did not tender back the scrip receipts he received. *Kempson v. Saunders*, Page 366

See also *Maudsley v. Le Blanc*, 409

2. If a person who is the inventor of a scheme get gentlemen to act as a committee, with intention of forming a joint-stock company to carry it into effect, and he himself act as secretary to the committee, he cannot maintain an action against one of the committee for his services as such secretary, or for his trouble, or for journeys he undertakes in furtherance of the execution of the scheme. *Parkin v. Fry*, 311

3. If persons conspire to fabricate shares in addition to the limited number of which a joint-stock company, according to its rules, consists, in order to sell them as good shares, they may be indicted for it, notwithstanding any imperfection in the original formation of the company. Whether scrip receipts, given by the bankers of such a company in return for sums paid as deposits, can be properly described as *shares* in the indictment, *quære*. *Rex v. Mott*, 521

JUDGMENT.

See COURT, 1.

JURY, SPECIAL.

Where a case turned solely on a question of law, and there was no fact in dispute between the parties, the Lord C. J. refused to certify for the special jury. *Wemys v. Greenwood*, 483

KING'S EVIDENCE.

See EVIDENCE, 5.

LARCENY.

665

LANDLORD AND TENANT.

See ALLEGATION, 2.

A. makes an agreement with B. for the sale of premises, at the time in the possession of C., under an agreement for four years, (three of which have expired), and undertakes to B. that he will do such repairs as are left undone by C. at the expiration of his (C.'s) tenancy. B. makes an agreement with C., in pursuance of which C. quits before the end of the four years, leaving the premises out of repair.—*Sem-ble*, that A. is bound to perform the repairs at the time of C.'s quitting, though it is before the expiration of the tenancy created by the agreement between A. and C. If the declaration in an action by B. against A. aver that C. did not leave the premises in good repair at the expiration of his tenancy, the agreement between A. and C. need not be produced to prove such averment. *Goodson v. Gouldsmith*, Page 555

LARCENY.

See EVIDENCE, 7.

1. If a man and woman be indicted for a larceny, the latter as a single woman, it is not sufficient to entitle her to an acquittal on the ground of coercion, to prove both jointly committed the offence, and that she had lived with the man for two years, and was reputed his wife—but such evidence must be given as to satisfy the Jury, that the prisoners are in fact married persons, though it is not absolutely necessary to prove the actual marriage of the parties. *Rex v. Hassall*, 434
2. If the only evidence against a prisoner indicted for larceny be, that the goods were found in his possession sixteen months after they had been stolen, the Judge will di-

668 MASTER AND SERVANT.

visits from the defendant in the capacity of a suitor. *Daniel v. Bowles*, Page 553

2. To support an action for a breach of promise of marriage, if the defendant has not married another, there must be evidence of an offer to marry on the part of the plaintiff and a refusal by the defendant. But if the plaintiff's father went to the defendant, and asked him if he intended to fulfil his engagements to his daughter, and he replied certainly not; proof of this will be sufficient. *Gough v. Farr*, 631

MASTER AND SERVANT.

1. If an agreement be entered into for the employment of a clerk for four years, from the 1st of January, 1823, at a salary of 400*l.* a-year, and the clerk be paid up to the 1st of January, 1825; and in July, 1825, the clerk is dismissed from his employment, he may commence an action in Michaelmas Term, 1825, though at that time, according to the agreement, a year's salary would not be due. *Pagani v. Gandolfi*, 370
2. If a clerk be engaged at a salary of 100*l.* a year, and have received his wages up to a certain time, and serve for some time longer, and then leaves the service before the year expires, without due cause and without any notice;—whether he is entitled to recover wages up to the time of his quitting—*Quære*. At all events, he is liable to a cross action for leaving the service without notice. *Huttman v. Boulnois*, 510
3. The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent receiving a salary of 500*l.* a-year. *Beeston v. Collyer*, 607

MONEY HAD AND RECEIVED.

MESNE PROFITS.

In an action for mesne profits, the judgment in ejectment is conclusive of the plaintiff's right to the premises from the day of the demise laid in the declaration in ejectment, but is no proof of the defendant's possession at that time. The consent rule admits the possession at the time of the service of the declaration in ejectment; but if the plaintiff intends to go for profits antecedent to that time, he must give distinct evidence of the defendant's possession. *Dodwell v. Gibbs*, Page 615

MILLER.

1. If the miller to a vendor of corn receive an order from such vendor to deliver a quantity of flour to the vendee, and actually deliver a part under several sub-orders from the agent of the vendee, and afterwards refuse to deliver the remainder on the ground of his having no more of the vendor's flour in his possession; the vendee may maintain trover against him, and will not be put to bring a special action of *assumpsit* on an implied promise to deliver the whole. *Smith v. Cook*, 276
2. Where goods have been sold by a miller, under circumstances which give him the right of refusing to deliver them, evidence of the insolvent state of the buyer's circumstances cannot be received in an action of trover, brought by the indorsee of the bill of lading against the wharfingers of the miller, unless such evidence can be brought home to the knowledge of the plaintiff. *Holliday v. Mann*, 509

MONEY HAD AND RECEIVED.

See BANKRUPT, 13.

The brokers to certain ship-owners charged their employers certain

NEGLIGENCE.

sums of money for work done to their ships, under the head of stevedore. The labour of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the ship-owners were aware that the brokers charged them more than they paid the workmen, but made no objection on account of their zeal and diligence: *Held*, that one of the workmen, under such circumstances, could not maintain an action for the larger sums received by the brokers, as money had and received to his use. *Wilson v. Cohen*,

Page 363

MORTGAGE OF A SHIP.

If the brokers to the mortgagee of a ship, who has taken possession, receive the freight, it is not recoverable from them in an action of *assumpsit* by the assignees of the mortgagor, (he having become a bankrupt,) if a sum equal in amount has been applied by the mortgagee to the payment of the seamen's wages. *Dean v. M'Ghie*, 387

NEGLIGENCE.

In an action *on the case* against an attorney for negligence, if the declaration state that the plaintiff retained him to see if a certain security were good, and that he accepted the retainer and neglected his duty, and represented the security to be good, and that the plaintiff advanced his money, and that the security was bad, by means of which the plaintiff lost the interest, the gist of the action is the negligence; and therefore the statute of limitations runs from the time of the negligence, and not from the time of the loss of the interest. *Howell v. Young*, 238

NUISANCE.

669

NOTICE.

See PRACTICE, 6.—CHECK, 2.—BILL OF EXCHANGE, 3,7.—BANK NOTES, 4.

1. A notice of action to a magistrate signed by a firm of two attorneys, who are partners, and employed by the plaintiff, is good. And if it be signed *T. & W. A. W.*, this is good, though the christian name of one is *T. A.*, and of the other *W. A.*, if there was no other firm of the same surname. *James v. Swift*, Page 237
2. A notice of set-off can only be given with the plea of the general issue. If there be any other plea besides the general issue, the set-off must be pleaded. *Webber v. Venn*, 310
3. If notice of disputing an act of bankruptcy be served on the clerk of the assignee at his counting house, that is a good service of it. *Widger v. Browning*, 523

NONSUIT.

See REPLEVIN, 1.

NUISANCE.

1. If a party set up a noxious trade remote from habitations and public roads, and after that new houses are built and new roads constructed near it; the party may continue his trade, although it be a nuisance to persons inhabiting such houses or passing along such roads. *Rex v. Cross*, 483
2. To support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to health; it is sufficient if they be offensive to the senses. *Rex v. Neil*, 485
3. If by a private act of Parliament, all houses for the slaughtering of horses within one thousand yards of a certain workhouse, are to be deemed public nuisances and removed; but if they existed before

the act, the owners are to receive a compensation: *Held*, that if an indictment be framed at common law with counts on that act, the defendant may be convicted; and if he so carried on the trade as to be in fact a public nuisance, he is not then entitled to any compensation. *Rex v. Watts*, Page 486

OFFICE.

See COVENANT, 1.

ONUS PROBANDI.

See HUSBAND AND WIFE, 6.

OUTLAWRY.

See PRACTICE, 3, 4.

OWNER, REPUTED.

See BANKRUPT, 16.

PARISH.

On the question whether a place is parcel of a certain parish; old entries made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs, &c. done to a chapel in the parish church, alleged to belong to the place in question, are not evidence. *Cooke, (Esq.) v. Banks*, 478

PARTICULAR OF DEMAND.

If the declaration is on a bill of exchange and for goods sold, and a particular of demand is obtained under a Judge's order, the plaintiff may recover on the bill, though it is not mentioned in his particular of demand. *Cooper v. Amos*, 267

PARTNER.

See EVIDENCE, 4.—PERJURY, 1.

1. An indorsee of a bill of exchange cannot recover against the acceptors of a bill, accepted by one who was formerly a partner, if such person had ceased to be a partner at

the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner, as if he allowed his name to remain on the door of the house of business, or the like. *Dolman v. Orchard*, Page 104

2. If one of the partners gave notice to a witness that they had ceased to be partners, that might be evidence for the defendants; but a conversation between the witness and one of the defendants, in which he so stated, is clearly not. *Ibid.*
3. Held, that the indorsee for value of a bill of exchange cannot maintain an action on a bill accepted by one partner in a transaction not relating to the partnership, against a secret partner; because such secret partner had neither privity of interest in the bill, not being accepted in a partnership transaction; nor was the bill taken on his credit, as he was not known to be a partner. *Lloyd v. Ashby*, 138
4. Both of two partners are liable for gas furnished, if they have both had the use of it, though the lease of the wharf upon which it is supplied is granted only to one of them. *The City of London Gas Light and Coke Company v. Nicholls*, 365
5. If money be lent to one of two partners who says he borrows it for the firm, and he misapply it, and there be proof that the plaintiff lent it under circumstances of negligence and out of the ordinary course of business, he cannot recover against the other partner. *Loyd v. Freshfield*, 325
6. If money be lent to one partner on his individual credit, the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment. *Ibid.*

PERJURY.

7. If a party recover damages in case against one of two joint coach proprietors, for an injury sustained by the negligence of their servants, such proprietor may maintain an action against his co-proprietor for contribution, if he prove at the trial that he was not personally present when the accident happened. *Wooley v. Batte*, Page 417

PATENT.

1. On *sci. fa.* to repeal a patent for a machine, on the ground that it is not new, you may, to prove that, put into the hand of a witness who had constructed a machine for the same purposes, a drawing, not made by himself, and ask him whether he has such a recollection of the machine he made as to be able to say that that is a correct drawing of it. *Rex v. Hadden*, 184
2. A patent reciting that the invention is for producing a certain effect with a machine, and that his machine will make paper of all widths, from one to twelve feet, cannot be supported if no one machine will produce this effect. *Bloxam v. Elsee*, Addenda vi

PERJURY.

1. If A. be indicted for perjury in swearing that he did not enter into a verbal agreement with B. & C., for them to become joint dealers and copartners in the trade and business of druggists; and it appear in fact that B. was a druggist, keeping a shop with which A. had nothing to do; but that A. & C. being sworn brokers could not trade, and therefore made speculations in drugs in B.'s name, with his consent, he agreeing to divide profit and loss with A. & C.; this will not support the indictment, as this is not the sort of partnership denied by B. upon oath. *Rex v. Tucker*, 500

PLEADING.

671

2. If an indictment for perjury charge that the defendant falsely swore to certain facts, and the deposition appear to be joint, and that his wife first deposes to the facts, and then the defendant swear that he is sure that A. B. is one of the persons who assaulted, &c. this is no variance, as it is sufficient for the indictment to state the substance of what the defendant swore. *Rex v. Grindall*, Page 568

PLEADING.

See ALLEGATION. — AUTREFOIS ACQUIT. — FALSE IMPRISONMENT, 1. — WARRANTY, 4.

1. To support a plea that the trustees under a private act of Parliament did not *allow or permit* the defendant to have the exclusive privilege of collecting dust and ashes in a certain place, it is necessary to prove some positive act of obstruction on their part; and it is not enough to prove that a third party took them away, having a right to do so. *Townson v. Green*, 110
2. And it seems that this is no answer to an action on a written contract, to pay a certain sum for the dust of a parish, but the party must seek relief in equity. *Ibid.*
3. An averment of a tender of a bail-bond for execution, is not proved by evidence of the sheriff's officer going to the defendant and asking him to sign the bail-bond, no bond being produced, he having none with him, and his assistant only having some blank bonds in his pocket, which he always carried. *Jarmain v. Algar*, 249
4. Form of a count for maliciously holding to bail, where there has been no arrest. *Small v. Gray*, 605

POSSESSION.

See LARCENY, 2.

PRACTICE.

See JURY (SPECIAL), 1.—NOTICE, 2.
—PUIS DARRIEN CONTINUANCE, 1.
—TRIAL, 1, 2.

1. *Scire facias* on a forfeited recognizance. Mode of proceeding. *Rex v. Wiblin*, Page 10

2. A plaintiff may be nonsuited after a plea of tender. *Anderson v. Shaw*, 85

3. If a plaintiff in a writ of error to reverse an outlawry, has assigned as error, that he was beyond sea when the exigent was awarded, and the defendant in error plead that "he left the realm of his fraud and covin, and to defeat him of his just debt, and for the purpose of avoiding the outlawry," and on this plea issue be taken: at the trial the defendant in error begins. *Bryan v. Wagstaff*, 125, *Addenda ii*

4. If on the trial it appear that a suit was commenced against him by original, and instead of giving bail he evades the officer, and goes abroad, this is evidence to induce the jury to presume that he went out of the country to avoid outlawry; because he must be supposed to consider, that, if he is so sued, and does not appear, an outlawry will follow. But if the proceeding against him had been by bill, it would be otherwise. *Ibid.*

5. Whether the plea of the defendant be good in law—*Quære*. *Ibid.*

6. If a party to a cause is abroad, but employs an attorney to conduct it, he will be presumed to have left in the hands of that attorney all papers material to the cause; and therefore, if on the 13th of December, between the hours of five and six in the afternoon, notice is given to his attorney to produce a paper material to the cause, and the trial

PRINCIPAL AND AGENT.

comes on on the 15th of December, this notice to produce is sufficient; and if the paper be not produced, the other party may give secondary evidence of its contents. *S. C.*

Page 126

7. After the plaintiff has closed his case, the learned Judge will generally allow him to adduce fresh evidence to obviate objections, which are beside the justice of the case, but not to get rid of any difficulty on the merits. In actions by the assignees of bankrupts, if the commission issued between the 2d of March and the 1st of September, the formal proofs in support of the commission must be made out by parol evidence of the trading, act of bankruptcy, &c., whether notice of disputing them has been given or not. *Semble*, that evidence of the mere fact of a bankrupt having drawn or indorsed a bill for 100*l.*, and of that bill being over-due in the hands of a holder, is not sufficient proof of a petitioning creditor's debt, without proof of a default in the acceptor. *Giles v. Powell*, 259

PRESUMPTION.

See EVIDENCE, 1.—SEDUCTION, 1.

PRINCIPAL AND AGENT.

See CARRIER, 4.

1. If an agent employed to sell coals make a bargain in his own name with a tradesman, to furnish him with coals on credit, for which in return he is to receive goods on credit, and the coals and the goods be both delivered, the real seller of the coals may recover the price of the tradesman, if his name be in the ticket sent with the coals as the seller; because the tradesman, after that, is bound to enquire into the nature of the agent's situation,

PRISONER.

and should not continue to treat him as a principal. *Pratt v. Willey*, Page 350

2. If before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told 2s. 6d. per cwt., by a clerk who is transacting the business there, and on the faith of this he sends the goods: the carrier cannot charge more, although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates, in which 3s. 6d. per cwt. was set down for goods of the sort in question. *Winkfield v. Packington*, 599

3. If a person employed by the administrator of a deceased debtor, to wind up the concerns of the deceased's business, give an undertaking to a creditor of the deceased, to furnish money to meet an acceptance which such creditor has given, in furtherance of an accommodation arrangement for delaying payment, in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt. *Maud v. Waterhouse*, 579

PRINTER.

A printer cannot recover against the publisher for printing a work, which contains the life of a prostitute and the history of her amours with various persons, and it is no answer that the parties are *in pari delicto*. *Poplett v. Stockdale*, 198

PRISONER.

See DAY RULE, 1.

PROMISSORY NOTE. 679

PRIVILEGED COMMUNICATIONS.

See WITNESS, 2.

PRIZE FIGHT.

1. All persons present countenancing a prize fight are guilty of an offence. *Rex v. Billingham*, 234
2. When a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they refuse to enter into securities, to commit them. *Ibid.*

PROHIBITED GOODS.

See CONTRABAND, 1.

PROMISE OF MARRIAGE, BREACH OF.

See MARRIAGE.

PROMISSORY NOTE.

1. The declarations of a former holder of a promissory note, payable on demand, made while he was the holder, are not evidence for the defendant in an action by a subsequent holder, unless the note had been presented for payment before such declarations were made. *Barrough v. White*, 8
2. Certain persons, directors of a company, borrowed of certain bankers, for the use of the company, 2000*l.*, for which they gave a *joint and several* note. Shortly after, at a meeting of the directors, at which one of them was not present, half the money was paid off, and a *joint* promissory note drawn, to which the signatures of all the directors were obtained. This note, on being tendered to the bankers, was refused; upon which the secretary to the company, who had no general authority, consulted with two

PUBLICATION IN NUMBERS.

of the directors, neither of them being the one who did not attend the meeting, and with their permission added to the note the words *jointly and severally*:—*Held*, in an action on the note by the bankers against such one director, that he was not liable, though on being written to for payment, his only reply was, "that from the death of a relation he could not then attend to the subject, but would give it his earliest attention:"—*Held* also, in the same case, that such one director was not *liable* upon the original consideration, though he was present when the money was borrowed, it appearing that one of the plaintiffs, the firm being composed of three, was an original holder of shares which had been afterwards sold, and the produce of them paid to another of the plaintiffs. *Perring (Bart.) v. Hone*,
Page 401

PROMOTIONS, 293, 641.

PROOF.

See ALLEGATION, 1.—EJECTMENT, 2.—LIBEL, 2, 5.—SEDUCTION, 1.—WILL, 1.—WORD.

PROSTITUTION.

See BOND, 1.—LODGINGS, 1.

PUBLICATION IN NUMBERS.

If a party agrees to take a work which is to be published in eighteen numbers, at intervals of two months; and after receiving several numbers, refuses to take any more, and also to pay for those which he has had; an action will lie for the price of the latter, and the statute of frauds does not apply, though the original contract was not to be executed within a year, for the law in such case will imply a further contract to pay for each number as it is delivered. *Mavor v. Pyne*, 91

RECEIVER, &c.

PUBLIC HOUSE.

1. In *assumpsit* on an agreement to transfer a public house, and assign the licences, the parties binding themselves in a penalty for the performance of the terms; if the vendor could not assign the licences, and the vendee had not the money ready at an appointment to settle the business, the penalty cannot be recovered; but if the vendee has paid the deposit, it may be recovered back. *Clarke v. King*,

Page 286

2. A check upon a brewer's house is not sufficient in such a case if tendered in payment, though it be proved to be the constant practice to use checks instead of money, in order to prevent robbery, on account of the lateness of the hour at which settlements take place in the transfer of public houses. *Ibid.*

PUIS DARRIEN CONTINUANCE.

A plea "*puis darrien continuance*" may be received at *Nisi Prius* on paper, and need not be transcribed on parchment. *Myers v. Taylor*,
306

RACE.

See HORSE-RACE.

RECEIPT.

See JOINT STOCK COMPANY, 3.—STAMP, 1, 2.

A paper in the form of a receipt, if it is not given in evidence as a receipt, does not require a stamp. *Brookes v. Davies*,
186

RECEIPT OF THE MASTER OF A SHIP.

See TROVER, 2.

RECEIVER OF STOLEN SECURITIES FOR MONEY.

A receiver of stolen securities for money is not punishable as an accessory to the felony under the stat.

SEARCH WARRANT.

3 Geo. 4, c. 24. It is considered that, from its inaccuracy, no conviction can take place on that statute. *Rez v. King*, Page 412
But see the stat. 7 & 8 Geo. 4, c. 29.

RECOGNIZANCE.

If a recognizance be estreated at the Quarter Sessions, and a writ issue to the sheriff to levy under the stat. 3 Geo. 4, c. 46, and the sheriff levy the amount; the Court of Quarter Sessions has the power to mitigate the amount, although the money has been actually levied, and the sheriff must pay back the difference to the party.—Whether on such a levy the sheriff is entitled to poundage—*Quære. Haynes v. Hayton*, 621

REGISTRY OF DEEDS.

An examined copy of the registration of a deed, in the registry of the county of Middlesex, is admissible as secondary evidence of its contents. *Doe d. Ubele v. Kilner*, 289

RENT.

See DOUBLE RENT, 1.—SHERIFF, 1, 2.

REPAIRS.

See AGREEMENT, 3.

REPLEVIN.

In replevin, if the defendant avow for rent in arrear, and the plaintiff replies *non tenuit*, on which issue is joined; if the plaintiff does not appear by himself or his counsel to open the pleadings, he may be nonsuited, though it is the defendant's record. *Symes v. Larby*, 358

SCHOOLMASTER.

See FRAUDS, STATUTE OF, 1.

SCRIP RECEIPTS.

See JOINT STOCK COMPANY, 2.

SEARCH WARRANT.

See BANKRUPT, 15.

SERVICE LOSS OF. 675

SECRETARY.

See JOINT STOCK COMPANY, 3.

SECURITIES.

See EMBEZZLEMENT, 1.

SEDUCTION.

In trespass for seducing the plaintiff's niece and servant, *per quod servitium amisit*, evidence that the party seduced (being about sixteen years of age) occasionally assisted in the household work, no servant being kept in the family, is sufficient to constitute the relation of master and servant between the uncle and niece; and such relation is not destroyed by the circumstance of the niece being entitled on her coming of age to a sum of nearly 500*l.*, of which the interest is applied in the mean time for her benefit. Proof in such case that the niece, after her seduction and abandonment by the defendant, returned to her uncle's house, where she continued some time in a state of great agitation, and received medical attendance, and was obliged to be watched lest she should do herself some injury, is sufficient to raise the presumption of that loss of service by the uncle which is necessary to maintain the action. *Manvell v. Thomson*, Page 308

SERJEANTS' INN, FLEET STREET.

The occupiers of houses in Serjeants' Inn, Fleet Street, are not liable to pay poor's rates to the parish of St. Dunstan in the West. *King v. Buttermorth*, 391

SERVICE OF NOTICE.

See NOTICE, 3.

SERVICE, LOSS OF.

See SEDUCTION.

If the plaintiff's son, who was in fact

his servant in delivering parcels from a stage coach, receive an injury by which the father is deprived of his services, the father is not entitled, as part of the damages in an action for the loss of his son's service, to have a compensation for the injury done to his parental feelings. *Flemington v. Smithers*,

Page 292

SET-OFF.

See APPRENTICE, 1.—NOTICE, 2.

SHARES.

See JOINT STOCK COMPANY, 2.

SHERIFF.

See WRIT, 1.

1. If the attorney for an execution creditor, on being informed of a claim by the landlord, for rent, direct the sheriff's officer to withdraw the execution, and he do so, and the plaintiff sue out a *ca. sa.* for the debt, such execution creditor cannot bring an action against the sheriff, for falsely returning to the *fi. fa.* that so much rent was due, and he will not be entitled to recover, though he shew that the supposed landlord had not a right to the rent claimed, and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was. *Stuart v. Whittaker*,

100

2. If an agreement for the assignment of a piece of ground, on payment of a sum of 1260*l.* contain a clause that the party agreeing to take the assignment shall pay and allow at the rate of 100*l.* per annum, from the time of taking possession, till the completion of the purchase, in equal half-yearly payments, a sheriff, on a writ of *fi. fa.*, has a right, under such clause, to treat the 100*l.* as rent, and deduct it out of the proceeds of the execution. *Saunders v. Musgrave*, (Bart).

294, *Addenda*, ix.

3. Trespass does not lie against a sheriff to recover damages for the seizure of property by his bailiff, under a writ of *levari facias* issued on a suit in the county court, because the sheriff is, in such case, a judicial and not a ministerial officer. *Tinsley v. Nassau*, Page 582

4. A sheriff's officer may recover the usual caption fees, notwithstanding the stat. 23 H. 6, c. 9. *Townsend v. Carpenter*,

118

SHIP.

See DEMURRAGE.—MONEY HAD AND RECEIVED, 1.—MORTGAGE OF SHIP, 1.

1. If in a case where (there being no charter party) the captain of a ship delivers the cargo, and as the best thing he can do for all parties, under the existing circumstances, takes a bill of the agent of the persons to whom the cargo on board belongs, for the amount of the freight: this does not discharge the owners of the cargo, but they are liable for the freight, if the bill be dishonoured; but if it appear that he might have had his money of the agent, and chose to take the bill, it is otherwise. *Strong v. Hart*,

55

2. By a charter party, on a voyage from Liverpool to the West Indies, and from thence to London or Liverpool, it is agreed, that a brig "shall be made, and during the voyage kept tight, staunch, &c. at the owner's expense, and that the freighter shall pay freight at the rate of 200*l.* per month, for any time (beyond six months) that she may be employed, the pay to commence from the day of sailing, till her arrival into dock at the homeward port of discharge." The vessel was obliged to remain twenty-eight days at St. Domingo, for the purposes of repair, the repairs being done at the expense of the owner:—*Held*, that during those twenty-eight days the vessel was employed

by the freighter, within the terms of the charter party. *Ripley v. Scaife*, Page 132

3. If by some mistake of a ship's manifest, a suit is commenced in a foreign port against the captain, for a supposed surreptitious landing of a part of his cargo, by which he is delayed in prosecuting his voyage, there being no suit against the ship: This is not a loss on which the underwriters on the ship are liable. *Bradford v. Levy*, Page 137

4. If one execute a ship's articles, to serve on board as an able seaman, at certain wages, and when on board act as a cuddy servant, if there be no express agreement that he shall receive separate wages as a cuddy servant, he can maintain no action against the captain for wages in that capacity. Whether he could, if there were an express agreement,—*Quære? Dafter v. Cresswell*, 161

SIGNATURE.

1. A person after he became a bankrupt, and before he had got his certificate, called at the office of his attorney, to whom he was indebted, and wrote there (the attorney not being at home) a letter promising to pay him a sum of 100*l*. The only signature was a flourish of the pen, which, it was contended by the plaintiff, formed the letter M. the initial letter of the defendant's name: *Held* that if it was an M. it was not a sufficient signature under the statute 6 Geo. 4, c. 16, s. 131. *Semble*, that if such a letter be without date the time it was written cannot be proved by parol evidence. *Hubert v. Moreau*, 528

SLANDER.

See ALLEGATION, 3.

1. Action lies against a person for saying of an inn and tavern keeper,

"you are a pauper, and will be in the bankrupt list in less than twelve months;" and it is not necessary to support an action for words spoken of a man in his trade, that his trade should be averred in the declaration to be such a one as will make him liable to the bankrupt laws. And proof at the trial that he has once sold spirits to be consumed out of his house is sufficient proof of his being a trader. *Whittington v. Gladwin*, Page 146

2. In an action for slanderous words charging a baker with selling adulterated flour, if the declaration alleges as special damage, that several persons, (naming them) discontinued to take his bread: the person of whom they used to buy it, cannot be asked what reason they gave for ceasing to take it any longer, but the persons themselves must be called to prove their motives. *Tilk v. Parsons*, 201

STAMP.

See AGREEMENT, 1.—BILL OF EXCHANGE, 1, 5.—COVENANT, 2.—RECEIPT, 1.

1. A receipt given by the stage manager of a theatre, "in satisfaction of all my claims for the last season," does not require the stamp of a receipt in full of all demands. *Dibdin v. Morris*, 44

2. A receipt for 52*l*. 10*s*. requires only a stamp for that amount, though it mentions 100*l*. paid before. *Ibid*.

3. A bond for foreign stock, signed in Paris, but issued in England, does not require an English stamp. *Yrisarri v. Clement*, 223

4. If an instrument has been originally unstamped, but has been stamped on payment of the penalty, it is admissible in evidence, though the receipt for the penalty has been erased, provided it be proved that such receipt had been indorsed on it. It is not necessary to prove the commissioner's signature to such

678 STAT. OF LIMITATIONS.

- a receipt. *The Apothecaries' Company v. Fernyhough*, Page 438
5. When it is objected that an agreement, which bears a 1*l.* stamp, is inadmissible, because it contains more than 1080 words, the counsel making the objection must be prepared with a witness who can prove that he has counted the words, and can positively state their number. The receipt for the penalty put on an agreement at the stamp office, when it is stamped there on payment of the penalty, is not to be reckoned in counting, whether the agreement "with every receipt &c. indorsed thereon," contains 1080 words, though the agreement cannot be read unless such receipt for the penalty is indorsed on it. *Bowring v. Stevens*, 337
6. If parties enter into a written agreement, which is duly stamped, and indorse new terms on it, varying the former agreement, such new terms will not be admissible in evidence without a fresh stamp; and as the entering into new terms put an end to the original agreement, the plaintiff cannot proceed upon that; and although there be counts in the declaration framed on each agreement; the plaintiff must be nonsuited. *Reed v. Deere*, 624

STATUTE OF FRAUDS.

See ACCEPTANCE, 1.—STATUTE OF LIMITATIONS, 1.

- A promise by a party to execute a bail-bond on a writ to be sued out against A. B., in consideration of the plaintiff's forbearing to arrest A. B. on a writ already sued out, is not a promise to answer for the debt, &c. of another, under the 4th section of the statute of frauds. *Jarmain v. Algar*, 249

STATUTE OF LIMITATIONS.

See NEGLIGENCE, 1.

A person borrowed a sum of money

TENANCY, EXPIRATION OF.

in the year 1807: in the year 1815 he stated by parol to the attorney of the party entitled to it, that he had made provision by his will, and had directed his executors to pay it at his death. He died in the year 1825, without having made any such provision:—*Held*, in an action against the executor, that the promise was good, and the money recoverable: that neither the statute of frauds nor the statute of limitations applied to the case: and that a moral obligation to pay was a sufficient consideration for the promise. *Wells v. Horton*, Page 383

STOLEN GOODS.

If a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, without having done every thing in his power to bring the thief to justice. *Gimson v. Woodfull*, 41

STOPPING IN TRANSITU.

See CARRIER, 1.

If trover is brought, and the intended defence is, that the defendant was the consignor of the goods, and had a right to stop them *in transitu*, and the plaintiff, in anticipation of this, set up that he *bond fide* bought the goods of such consignor before the stoppage *in transitu*—If it appear that the purchase by the plaintiff was by a written agreement, such agreement must be produced; and if it is not, the plaintiff will not be allowed to give other evidence of his buying the goods. *Brain v. Harden*, 52

SUBSCRIPTION.

See CLUB-HOUSE, 1.

TENANCY, EXPIRATION OF.

See AGREEMENT, 3.

TENDER.

1. If ten sovereigns are offered to a person, and he is told that he may "take those ten sovereigns in full of his demand," that is not a good tender. *Cheminant v. Thornton*, Page 50
2. *Semble*, that a tender must be taken to be made on the behalf of the person who owes the money. *Ibid.*
3. If a person put down a sum of money, and the plaintiff offer to take it in part, and the defendant will not allow him to do so, saying that no more is owing—This is not a good tender, because a person tendering money should tender it without making any terms, and leaving it open for one party to say that more was due, and to the other that the sum tendered was sufficient. *Peacock v. Dickson*, 51
4. If a third person, present at an interview between plaintiff and defendant, when defendant was willing to pay 10*l.*, offer to go up stairs and fetch that sum, but is prevented by the plaintiff's saying he cannot take it—such offer is a good tender; and though the defendant did not at the time take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act. *Harding v. Davies*, 77

TESTATOR.

See WILL, 2.

THREATENING TO PROSECUTE.

See INDICTMENT, 2.

TIMBER.

Two persons were indicted on the 6 Geo. 3, c. 36, for lopping and topping an ash timber tree, without the consent of the owner. The owner died before the trial, having first given orders for the apprehension of the prisoners on suspicion. The offence was committed at eleven o'clock at night, and the prisoners,

when detected, ran away. The land-steward of the owner proved, that he had not given any consent, and did not believe that his master had:—*Held*, that this was evidence from which the jury might infer that no consent had been given by the owner. *Rex v. Hazy and Collins*, Page 458.

Note.—This statute is now repealed, and other provisions substituted by the stats. 7 & 8 Geo. 4, c. 29 & 30.

TITHES.

1. The time when the tithe of potatoes becomes the property of the parson is when they are dug up and laid in heaps, and not when they are "boughed out," while remaining in the ground. *Bearblock (Clerk) v. Hancock*, 425
2. Evidence is admissible in an action for tithes on stat. 37 Hen. 8, of the fact of some of the parishes in London paying at the rate mentioned in the decree made by virtue of that statute, in order to raise a presumption that such a decree had been enrolled, no entry of such enrolment being to be found; a copy of the decree annexed to the statute, in a printed copy obtained from the King's printer, being produced.—*Macdougall v. Young*, 278

TOMBSTONE.

1. Trespass, and not case, is the proper form of action for taking away a tombstone from a church-yard, and obliterating an inscription made upon it. *Spooner v. Brewster*, 34
2. After a man's return from transportation, he may maintain trespass for injury done to a tombstone erected by his wife during his absence. *Ibid.*

TRADE.

See NUISANCE, 1, 3.—WORD.

If one allow another to trade in his own name, and as carrying on the business for himself, a payment to

such person is a good bar to an action by the person so allowing him to trade; and for goods sold in the trade, the person so carrying it on may recover, unless the person for whom it is carried on assert his or her own right to the sum due.—*Gardiner v. Davis*, Page 49

TRANSITU, STOPPING IN.

See STOPPING IN TRANSITU.

TRESPASS.

See FALSE IMPRISONMENT, 9.—
TOMBSTONE, 1, 2.

TRIAL.

1. A Judge at *Nisi Prius* will put off, on sufficient cause, a trial, on application by a plaintiff, *till the next sittings*, if it be in Term, or *for a few days*, if it be after the Term, but if longer delay be required, the plaintiff can only obtain it by withdrawing the record. *Curtis v. Barker*, 185
2. If, at the assizes, a prisoner is tried for a misdemeanor under the commission of gaol delivery, and during the trial becomes ill, and is obliged to be assisted out of Court, the Judge will discharge the jury; and the consent of his counsel that the trial shall proceed in his absence, is not sufficient to authorize the trial to proceed. If the prisoner recover during the assize he may be tried, the whole of the proceedings of the trial being commenced *de novo*. *Rex v. Streek*, 413

TROVER.

See BANK-NOTES.—BILL OF EXCHANGE, 2, 3.—DELIVERY-ORDER.—MILLER, 2.

1. The servant of the defendant, a coach-spring maker, received a spring of the plaintiff's to repair, and promised to bring it back by a certain hour. The defendant after that refused to return it without

- being first paid for the repair:—*Held*, not a sufficient conversion to support trover. The action, if any will lie, should be special *assumpsit*. *Fairman v. Grimble*, Page 266
2. Where the master of a ship gives a receipt for goods put on board, it behoves him not to sign a bill of lading till that receipt is given up. If such a receipt is in the hands of the consignor, who, after the failure of the consignee, demands the goods, and the captain refuse to deliver them, alleging as his reason that he has signed a bill of lading to the consignee, this is a conversion, though the consignor did not tender either the freight or a compensation for the trouble of loading; and the fact that one of the consignors said to one of the consignees after the failure, that he was sorry for it, but would do as the other creditors did, will not make it less a conversion if that conversation was unknown to the captain. However, if the captain, instead of assigning the reason he did for the non-delivery; had said, "the goods are now on board, and I must take them to their destination," that would have been no conversion. The fact that the ship is named by the consignee, makes no difference as to a stoppage *in transitu*. *Thompson v. Trail*, 334
 3. If A. has in his possession a box containing papers belonging to a person deceased, and send the box with its contents to his solicitors, with directions to deliver the box and papers to the executor on his giving an inventory of them and a receipt:—*Held*, that trover lies against the solicitors, if they refuse to deliver the box and papers to the executor, he refusing to give an inventory and receipt, although the solicitors offered to give them up if the executor would give an inventory and receipt. *Cobbett v. Clutton*, 471

USE AND OCCUPATION.

4. A father gave his son a watch, some printed books, and several articles of wearing apparel:—*Held*, that though the son was under age, (*viz.* about sixteen years old), the father could not maintain trover against a person who detained the property, because the right of possession was not in him, but in his son. *Hunter v. Westbrook*, Page 578
5. In an action of trover for goods, the party who sold them to the plaintiff, on an understanding that if they were not paid for they were to be returned, is a competent witness for the plaintiff, although he has not been paid, and the plaintiff's succeeding in the action will enable him to have them back. *Banks v. Kain*, 597

VARIANCE.

See LIBEL, 3.

If in an action of covenant, the declaration state that the deed was made between the plaintiff of the first part, J. C. of the second part, and A. B. of the third. And the deed when produced appear on the face of it to be by the plaintiff, as trustee of J. C., of the first part, G. C. of the second, and A. B. of the third part, and the deed be executed by G. C. This is a fatal variance, although the breaches assigned do not in any way affect the party who is intended to be described as of the second part. *Mayelston v. Palmerston*, (Lord), 474

VENDOR.

See ACCEPTANCE, 1.

USE AND OCCUPATION.

If a person let apartments for a year to a tenant, who occupies them part of the year, for which he pays, and then quits, and the party letting suffer another to occupy on an agreement also for a year, so that

WARRANT OF ATTORNEY. 681

the first tenant could not, if he had wished, have obtained possession, such second letting is a rescinding of the first contract, so as to prevent any rent being recovered under it. *Walls v. Atcheson*, Page 268

USURY.

If a bond be given for the repayment of money, with interest at 5*l.* per cent., proof that the obligee has received interest at 7½ per cent. will not avoid the bond, unless the jury are satisfied that it was agreed, at or before the execution of the bond, that more than 5*l.* per cent. should be paid. *Fussil v. Brookes*, 818

WAREHOUSE.

See CARRIER, 2.

Corn sent to a factor for sale, and deposited in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself. *Matthias v. Mesnard*, 358

WARRANT OF ATTORNEY.

If A. owe B. a sum of money, *e. g.* 4000*l.*, and give a warrant of attorney to confess judgment for that sum, and after that dealings and payments take place between them, to an amount of 2000*l.* on each side of the account, but no payment made specifically in discharge of the warrant of attorney, the creditor may enforce it, though subsequently to its date he received a larger sum than it was given for; as, if it was not specifically paid in discharge of the warrant of attorney, the creditor might put it in reduction of which of the two accounts he chose. *Wooley v. Jennings*, 144

WARRANTY.

1. If a general warranty of a horse

be proved by parol, (the written contract for the sale not being forthcoming), the fact that the witnesses who proved it saw a notice-board on the seller's premises requiring the return of an unsound horse within six days, will not defeat the buyer's action, but it will be left to the Jury for them to say, whether this formed any part of the original contract. *Best v. Osborne*, 74

2. If the owner of a horse sold by a stable-keeper with a warranty go to the buyer and request to have the horse back, stating, that he did not authorize the warranty of soundness, and the buyer refuse to give it up, saying, I know nothing of you; I bought the horse of Mr. O.; such refusal is not a waiver of the warranty. *Ibid.*

3. In an action on the warranty of a horse, letters passing between the plaintiff and defendant, in which the plaintiff writes, "you will remember that you represented the horse to me as a five-year old," &c., to which the defendant answers, "the horse is as I represented it," are sufficient evidence from which the Jury may infer that a warranty was given at the time of the sale; and it is not necessary to give other proof of what actually passed when the contract was made. *Salmon v. Ward*, 211

4. In an action for a breach of an express warranty, that a horse was quiet, if the declaration allege that the defendant *well knew* him to be unquiet, this is an unnecessary averment, and need not be proved. *Gresham v. Postan*, 540

WEST INDIA DOCKS.

In an action of trover brought against the treasurer of the West India Dock Company for refusing to deliver articles deposited in the West India Docks, he is entitled to the protection of the Dock Act, which requires, that actions for any thing

WILL.

done in pursuance, or under colour of that act, should be brought within three months; and the circumstance of his having taken a bond of indemnity, is not a waiver of such protection. *Sellick v. Smith*, 284

WHALE FISHERY.

By the usage of the whale fishery, a fish is to be considered as a *fast* fish, which is attached by any means (such as the entanglement of the line round it, &c.) to the boat of the first striker, *though the harpoon does not continue in the body* of the fish—and this is a more reasonable usage than that mentioned in a note to the case of *Fennings v. Lord Grenville*, in 1 Taunt. p. 243. *Hogarth v. Jackson*, 595

WHARF AND WHARFINGER.

See DISTRESS, 2.—MILLER, 2.

WILL.

1. It is no objection to a will more than thirty years old, being read in evidence, that possession has not followed it—because the Court cannot know how the will directs the possession to go, till it is made acquainted with the contents of the will by its being read. If in the year 1794, the present defendant in ejectment obtained a verdict for the premises in question, and the present lessor of the plaintiff (who was neither a party to that trial nor claiming under any one who was so) introduce what passed at that trial, and go on to shew that the verdict then proceeded on improper evidence; after this the now defendant may give evidence of what deceased witnesses proved at that trial, with a view of shewing that that verdict was a correct one. *Doe d. Lloyd v. Passingham*, 440

2. To constitute a good attestation of a will of lands, it is not necessary

that the testator should *actually see* the witnesses sign the attestation. It is sufficient if he were in such a situation that he *might see* them attest his will. If on the evidence it appear that the testator was too weak to get out of bed, and it be doubtful whether the attestation was signed in the room in which he was, or in the next room, the door being open, it will be for the jury to say whether the will was attested, either in the same room, or in such a part of the next room that the testator *might see* them sign the attestation: in either of those cases the attestation is good. But if the jury should think that the attestation was signed by the witnesses at a part of the next room, where the testator *could not see* them, that is not a good attestation, notwithstanding the door between the two rooms was open, and the testator might hear what the witnesses said in the next room, if they spoke in the ordinary tone of voice. *Tod v. The Earl of Winchelsea*, Page 488

WITNESS.

See ATTORNEY, 5.—DEED, 1.—INSOLVENT, 3.—WILL, 2.

1. If goods were sold on commission by the defendant abroad, on an action for not accounting, the defendant's agent in London is a competent witness for the plaintiffs, though he has accepted a bill for the price of them, which is lying dishonoured in the hands of the plaintiffs. *Martineau v. Woodland*, 65
2. The rule respecting privileged communications extends to an attorney's clerk, as well as to the attorney himself. *Taylor v. Forster*, 195
3. A witness has no right to refresh his memory with a copy of a paper made by himself, six months after he wrote the original, though the original is proved to be so covered

- with figures that it is unintelligible, the original paper having been written near the time of the transaction. *Jones v. Stroud*, Page 196
4. Whether a witness called on behalf of a plaintiff, to prove an agreement, who admits, on his cross-examination, that the signature to the agreement is his and not the plaintiff's, can be asked whether he signed it on behalf of the plaintiff and as his agent—*Quære*. *Poplett v. Stockdale*, 198
 5. *Assumpsit* for mourning, against an executor, furnished to the widow and family of the defendant's testator. This not being a funeral expense that the executor could claim against the estate, a legatee is a competent witness for the executor, though it was objected that he was interested to prevent the estate being charged, out of which his legacy was to be paid. *Johnson v. Baker*, 207
 6. In an action on a bill of exchange by the second indorsee, against the drawer; the first indorsee is a competent witness for the plaintiff. *Hewitt v. Thompson*, 372
 7. If a witness is called, and refreshes his memory as to the numbers of bank notes by an entry in a book, the counsel of the opposite party may cross-examine as to the other parts of that entry. *Loyd v. Freshfield*, 325
 8. If in *assumpsit* for work and labour, the defence be that A. B. was employed to do the work, and not the plaintiff, A. B. is a competent witness to prove this, although he is an uncertificated bankrupt, and his assignees have received the amount due for this very work, as done by him. *Wilson v. Gallatly*, 467
 9. If the counsel for the defendant in cross-examination put a paper into the witness's hand, to refresh his memory, the opposite counsel has a right to look at it without being bound to read it in evidence; and

the opposite counsel may also ask the witness when it was written, without being bound to put it in. *Rex v. Ramsden*, Page 603

WORD.

If a word has acquired a particular meaning in a certain trade, that meaning will be applied to it in construing a written contract respecting that trade; but that the word has acquired that particular meaning must be distinctly proved. *Taylor v. Briggs*, 525

WRIT.

In an action for a false return of *nulla bona* to a *fi. fa.*, if the plaintiff shew the debtor to be possessed of certain goods, it is no defence for the sheriff to shew a prior execution to an amount of greater value, if to that execution the sheriff also returned *nulla bona*: nor, if the sheriff has the proceeds of the goods in his hands, is it any defence to shew that the *fi. fa.*, on the return of which the action is brought, was delivered at the sheriff's office at a quarter past five o'clock on the day on which it is returnable. *Tonne v. Crowder*, (Esq.), 855

WRIT OF RIGHT.

1. On the trial of a writ of right, the four knights who return the grand assize must themselves attend and sit with twelve of the jurors whom they return, a jury of sixteen so constituted being by law required for the trial; and any sixteen of the assize are not sufficient. *Tooth v. Bagwell*, 187
2. On an affidavit of particular circumstances, such as the great age and expected death of witnesses, the Court will depart from their general rule not to try a writ of right in an issuable Term. *Ibid.*
3. If it appear on the day appointed

WRITING, HAND.

for the trial, that one of the four knights is so ill, that he not only cannot then attend, but is not likely to be able to attend on a future day, the Court will order the sheriff to summon another knight to act in his stead; and it will not be necessary that any fresh selection of a grand assize should be made by the knights in consequence of the alteration which has taken place in their body. *Ibid.*

4. On the trial of a writ of right, though the demi-mark has been tendered, the tenant must begin. The demi-mark may be tendered either at the joining of the mise, or at the swearing of the grand assize; and if it has been done at the joining of the mise, it is too late at the time of trial for the counsel to take the objection. *J. Bagwell*, 271
5. An examined copy of a paper in Chancery by a person a party to the action is evidence and it is not necessary to produce the original, or prove the handwriting of the party. *Ibid.*

WRITING, HAND.

1. If a person proves that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the master's office, which the attorney of the party admitted to be of his handwriting, and the person has acted on these papers so admitted — This is not such a knowledge of the party's hand-writing, as will enable the person to prove a written document, alleged to be in his hand-writing. *Greaves v. Hunter*, 477
2. But if he has received letters from the party, and acted on them, that will be sufficient. *Sharpe v. Gisburne*, 21

26

Stanford Law Library



3 6105 062 770 065

